United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1384

To be argued by
MICHAEL Q. CAREY

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1384

UNITED STATES OF AMERICA,

Appellee,

—v.—

REV. ALBERTO MEJIAS, a/k/a Rev. Angel Ortiz, a/k/a Rev. Ronald Powem, a/k/a Francisco Ignacio Roldan Mejia; MARIO NAVAS, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon; ESTELLA NAVAS, a/k/a Estella Rodriguez, a/k/a Maria Torres; HENRY CIFUENTES-ROJAS, a/k/a Botellon, a/k/a BOTELLO, a/k/a Freddy Valdes, a/k/a Carlos Vega, a/k/a Jose Lopez Moralez; JOSE RAMIREZ-RIVERA, a/k/a Hugo, a/k/a Juan Ramirez; MANUEL FRANCISCO PADILLA MARTINEZ; and FRANCISCO CADENA, a/k/a Francisco Salazar;

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL Q. CAREY,
NATHANIEL H. AKERMAN,
FREDERICK T. DAVIS,
AUDREY STRAUSS,
Assistant United States Attorneys
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL Q. CAREY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of January, 1977, he served a copy of the within Brief for the United States of America by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007
Attn: Jonathan J. Silbermann, Esq.

Ivan S. Fisher, Esq.
410 Park Avenue
New York, New York 10022

John A. Ciampa, Esq.
785 West End Avenue
New York, New York 10025

Stuart R. Shaw, Esq.
600 Madison Avenue
New York, New York 10022

Howard L. Jacobs, P.C.
401 Broadway
New York, New York 10013

Michael P. Stokamer, Esq.
Stokamer & Epstein, Esqs.
100 Church Street
New York, New York 10007

Abraham Solomon, Esq.
85 Baxter Street
New York, New York 10013

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing in front of the United States Court House, Foley Square, Borough of Manhattan, City of New York.

MICHAEL Q. CAREY
Assistant United States Attorney

Sworn to before me this

10th day of January, 1977

Notary Public

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0235340
Qualified in Kings County
Commission Expires March 30, 1977

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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Rev. Alberto Mejias, a/k/a Rev. Angel Ortiz, a/k/a Rev. Ronald Powem, a/k/a Francisco Ignacio Roldan Mejia; Mario Navas, a/k/a Mario Rodriguez, a/k/a Victor Jaramillo, a/k/a Isidoro Colon; Estella Navas, a/k/a Estella Rodriguez, a/k/a Maria Torres; Henry Cifuentes-Rojas, a/k/a Botellon, a/k/a Botello, a/k/a

Freddy Valdes, a/k/a Carlos Vega, a/k/a Jose Lopez Moralez; Jose Ramirez-Rivera, a/k/a Hugo, a/k/a Juan Ramirez; Manuel Francisco Padilla Martinez and Francisco Cadena, a/k/a Francisco Salazar appeal from judgments of conviction entered July 30, 1976 in the United States District Court for the Southern District of New York, after a five and one-half weeks trial before the Honorable Robert L. Carter, United States District Judge and a jury.

Indictment 76 Cr. 164, filed February 19, 1976, in five counts, charged the above-named defendants and three others with violations of the federal narcotics laws. Count One charged all seven appellants and Alba Luz Valenzuella, Antonio Lopez and Juan Guillermo Mesa with a conspiracy to import cocaine into and to possess and distribute cocaine in the United States, in violation of Title 21, United States Code, Sections 846 and 963. Counts Two through Five charged Mario Navas in two counts and Estella Navas, Rev. Alberto Mejias and Henry Cifuentes-Rojas in one count each with possession with the intent to distribute and with distributing cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on May 24, 1976, and on June 30, 1976, the jury returned verdicts of guilty against each appellant on all charges.*

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* The jury was unable to reach a verdict with respect to defendant Alba Luz Valenzuela and Judge Carter declared a mistrial as to her. On November 5, 1976, Judge Carter granted Valenzuela's motion to dismiss the indictment against her. Defendant Antonio Lopez is a fugitive and defendant Juan Guillermo Mesa is presently in custody in Italy awaiting extradition.

On July 30, 1976, Judge Carter sentenced the defendants as follows:

Defendant	*Counts*	*Term of Imprisonment*
Rev. Alberto Mejias	One	15 years, 534 days suspended
	Four	534 days, consecutive to Count One
Mario Navas	One	15 years, 503 days suspended
	Two	503 days, consecutive to Count One
	Three	15 years, concurrent with Count One
Estella Navas	One	15 years, 503 days suspended
	Three	15 years, concurrent with Count One
Henry Cifuentes-Rojas	One	15 years, 534 days suspended
	Five	15 years, 534 days suspended, concurrent with Count One
Jose Ramirez-Rivera	One	15 years, 534 days suspended
Francisco Padilla	One	15 years, 534 days suspended
Francisco Salazar	One	15 years

Each appellant is currently serving the sentence imposed by the District Court.

Statement of Facts

The Government's Case

A. Summary

From mid-1973 through October 4, 1974, appellants and their co-conspirators were members of a massive international narcotics organization which smuggled hundreds of kilograms of cocaine and thousands of pounds of marijuana into the United States from Colombia, South America for distribution in New York City.

The narcotics were brought directly into New York City or indirectly, for example, through Florida, Central America, Germany, and Canada. Hundreds of kilograms of cocaine were smuggled into this country inside specially constructed false-bottom shoes and suitcases, hollowed-out coathangers and double-lined girdles and brassieres.

The organization had the usual resources such as a sophisticated counterfeiter who manufactured bogus passports and the equipment necessary to manufacture specially designed shoes and coathangers to smuggle cocaine through United States Customs. The organization also had members who acted as financiers. In this case, defendant Mejias was financed by defendants Francisco Padilla and Francisco Cadena (hereinafter "Salazar"). Moreover, the organization regularly collected hundreds of thousands of dollars and just as regularly returned large portions of it to Colombia to finance the continuing success of the enterprise.

In the United States, the organization was represented by its importers, principal among whom were the defendants Rev. Alberto Mejias and Mario Navas and co-

conspirator Francisco Adriano Armedo-Sarmiento (hereinafter "Mono").* Each of the importers also acted as or had his own wholesalers and operated not only from his own residence but from apartments kept exclusively as warehouses of cocaine and marijuana. Thus, defendant Mario Navas kept apartments in addition to his residence throughout 1974 in various locations and employed co-conspirator Walter Rodriguez as custodian of his "stash." Defendant Mejias lived for a time in a convent while he maintained a separate apartment for his narcotics business. Co-conspirator Mono changed his residence frequently and used defendants Rojas and Ramirez, as well as co-conspirators Carmen and Libardo Gill, as his wholesalers and guardians of his "stash" apartments.

As with any importing business, shipments did not always arrive when expected though demand for the purchase of cocaine continued unabated. Thus, when supplies of an individual importer or wholesaler were exhausted, he could and did reach out to other importers or wholesalers in the organization to replenish his stock.

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* Armedo-Sarmiento most frequently referred to himself as Mono and was addressed by that name by most of his co-conspirators although he was also known by the names Francisco Velez, Elrin Diaz and Pacho. He and eleven co-conspirators were convicted of charges in Indictment 75 Cr. 429, *United States* v. *Alberto Bravo, et al.*, after a fourteen week trial before the Honorable John M. Cannella and a jury which ended January 23, 1975. Nine defendants appealed from their convictions. Seven had their convictions affirmed and two, Libardo and Carmen Gill, had their convictions reversed. *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305 (2d Cir., Oct. 28, 1976).

Mono and the defendants tried with him, as well as the defendants in this case, were members of one conspiracy. Indeed, each was a member of the conspiracy during the last days of its operation. The evidence in each case overlapped to a great extent.

Thus, for example, defendant Mario Navas purchased cocaine from defendant Mejias and co-conspirator Hugo Diaz, a wholesaler in his own right. Defendant Ramirez borrowed cocaine from co-conspirator Mono's supplies allocated to defendant Rojas and Rojas, in turn, made purchases of cocaine from Mejias.

Finally, the wives of the members of the organization were members in their own right and they took an active part which assured the success of the operation. Defendant Estella Navas, wife of defendant Mario Navas, packaged and moved cocaine and relayed orders and messages to her husband from other members of the organization. Co-conspirator Carmen Gill, wife of Libardo Gill, was a wholesaler for Mono in her own right and with her husband kept records of their cocaine and marijuana sales. In the same manner, the wife of defendant Ramirez took and relayed messages for him and watched over his supplies of narcotics.

There were no witnesses who could be called the Government's principal witnesses in the usual sense; that is, there were no informer or accomplice witnesses. However, two police officers of the New York City Police Deparment, Detectives Luis Ramos and Vincent Palazzotto, provided key testimony. Detective Ramos testified about undercover purchases from defendant Mario Navas and Detective Palazzotto testified about the arrest of defendants Mejias, Padilla, Salazar and Valenzuela and the search of Mejias' apartment which followed. In addition, the Government proved its case with innumerable surveillances of members of the organization between January and October 4, 1974, with transcripts of approximately 154 wiretapped telephone conversations and finally, with evidence seized at the residence or "stash" apartments of members of the organization.

B. A Brief Chronology

1. The Organization Is Infiltrated-Undercover Buys

The first direct infiltration of the organization occurred in July, 1973. At that time, undercover Detective Luis Ramos of the New York City Police Department first met co-conspirator Lilia Prada who police later learned received her cocaine supplies from co-conspirator Esmerida Sanchez, the live-in maid of defendants Estella and Mario Navas. Over a six-month period between July, 1973, and January, 1974, Detective Ramos regularly purchased cocaine from Lilia Prada, usually in multiples of 1/8 kilogram and at prices ranging from $5,600 to $10,000. In all, his purchases from Prada totalled approximately $24,000. (Tr. 272-91).*

Unable to induce Prada to introduce any undercover officer to her ultimate source, defendants Mario and Estella Navas, the police decided to arrest her. On January 31, 1974, Esmerida Sanchez delivered cocaine she had obtained from Mario Navas to Lilia Prada and each was arrested in the latter's apartment at 118 West 109th Street in Manhattan as the cocaine was being sold to undercover detective Ramos. After their arrests, Lilia

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* "Tr." refers to pages in the official transcript; "GX" refers to the Government's exhibits; "No. . . ., [date]" refers to the number of a recorded conversation admitted into evidence and the date it was recorded. "Br." refers to the brief of the appellant specified; "3/30/76 Tr." refers to the pages of the pre-trial conference on March 30, 1976 and "H.Tr." refers to the pages of the pre-trial suppression hearing conducted on the defendants' motions to suppress evidence seized at defendant Mejias' apartment, 445 West 48th Street in Manhattan.

Prada and Esmerida Sanchez began to cooperate with the police.* (Tr. 291-94).

2. The Scope Of The Organization's American Operations Are Identified—The Wiretaps

a. Wholesale Operations—Winter 1974

Approximately one month before Lilia Prada's arrest, a wiretap was installed on her telephone pursuant to a warrant authorized by state law and ordered by a justice of the Supreme Court of the State of New York.** As a result, the police learned that defendant Mario Navas was the ultimate source for the cocaine which Detective Ramos had purchased from Prada. (*e.g.*, Conv. 49, 56, 1/4/74; Conv. 61, 91, 92, 94, 1/5/74).

In early February, Prada, accompanied by Sanchez, wore a recording device during a meeting she had with defendants Mario and Estella Navas. The meeting took place at the Navas' residence at Apartment 242, 80-15 41st Avenue, Queens. (GX 15B). During the meeting Prada paid defendant Mario Navas $6,400 for 1/4 kilogram of cocaine and defendant Estella Navas packaged it to be carried from the apartment. (GX 5B, 2/3/74, NAGRA 948). In addition, during the conversation and afterwards, plans were made for another purchase of cocaine by Prada from Mario Navas for eventual delivery to Detective Ramos as part of a planned purchase of

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* Before their own or any other trials of members of the organization, Prada and Sanchez fled and they remain fugitives to this day.

** All the wiretaps which followed this were based on the same authority. No question of the legality of the wiretap is raised on this appeal.

three kilograms of cocaine. (Conv. 167, 2/1/74; Conv. 345, 2/2/74; GX 5B, 2/3/74, NAGRA 948; Conv. 369, 2/3/74).

On February 5, 1974, Mario Navas delivered another 1/4 kilogram of cocaine to Prada, this time in the presence of an undercover police woman, at Prada's apartment, 118 West 109th Street in Manhattan and was later paid $6,400 by Ramos. Mario Navas then agreed to sell Detective Ramos three kilograms of cocaine, the time and place of the sale to be settled through Prada. During the conversation, Mario Navas explained that he had access to as much as 30 kilograms of cocaine. (Tr. 300, 433, 438-39; GX 16, 17B). The plan to purchase the three kilograms was aborted for lack of funds and this was the last time the police had any direct contact with Mario Navas until his arrest on October 4, 1974. (Conv. 602, 2/6/74).

The day after Detective Ramos made the cocaine purchase from Mario Navas, on February 6, 1974, Mono began living at Apartment 10F, 215 East 64th Street in Manhattan and the police received their first evidence that Mario Navas used an apartment at 132-65 Pople Avenue, Queens, to store and process cocaine. On February 6th, Mario Navas carried a bag into 132-65 Pople Avenue. Defendant Juan Guillermo Mesa (hereinafter "Juan Mesa") also entered the building that day. On five other occasions, significant surveillances were made at that address between February 7th and March 5th, 1974. For example, on February 19th, 22nd and 26th, Mario and Estella Navas went to the building with, or were joined there by, either co-conspirators Toto, Jero or Carlos Vasquez or defendant Juan Mesa. Finally, on March 5, 1974, defendants Mario Navas and Mesa and co-conspirator Jero were seen at a table while Mario Navas sifted cocaine. Later, in the same apartment, Jero was seen alone sifting, weighing and packaging cocaine. (Tr. 940-41, 944, 950, 954, 991-93).

Within three weeks of Mono's initially taking up residence in Apartment 10F, 215 East 64th Street, Manhattan, on February 26, 1974, Juan Mesa and co-conspirator Vasquez, the latter carrying a black bag, had a meeting with Mono to pick up a package of narcotics from him. (Conv. 1646, 2/25/74; Conv. 1711, 1760, 2/26/74). Only two days later, there was another meeting at Mono's apartment, this time bringing together defendants Mejias and Mario Navas, and co-conspirators Mono and Vasquez. When the meeting ended, Mario Navas, Mejias and Vasquez each carried a bag or other container from the apartment. (Tr. 1529-31, 1401-02). The wiretap conversations obtained during this period established that Mono, Juan Mesa, Mejias and Mario and Estella Navas were all working together in distributing narcotics. (*e.g.*, Conv. 949, 2/11/74; 1523, 2/22/74; 646, 2/25/74; 1711, 1737, 1760, 2/26/74; 161, 3/15/74; 297, 3/18/74).

Juan Mesa, Mario Navas and Carlos Vasquez worked closely together in selling cocaine. Thus, on February 22, 1974, Carlos Vasquez carried a brown paper bag into 132-65 Pople Avenue and Juan Mesa delivered cocaine to Claude Perry. (Tr. 632; Conv. 1538, 2/22/74). On March 18, 1974, Mario Navas also delivered cocaine to Claude Perry who was arrested in possession of cocaine shortly afterwards. (Tr. 667, 676; GX 50).

At the same time that Mario and Estella Navas and Juan Mesa maintained a stash apartment at 132-65 Pople Avenue, Queens, Mario and Estella Navas had a second stash apartment at 33-24 Parsons Boulevard in Queens. The apartment was first identified on March 4th, 1974 when Mario Navas and another were seen entering it. Further evidence that it was a stash apartment was provided when, on the same day as Mario's sale to Claude Perry and immediately prior to Perry's arrest, Mario Navas entered it carrying a black bag. (Tr. 620, 629).

Moreover, Mario Navas was seen carrying a shopping bag into 33-24 Parsons Boulevard for the last time on April 5, 1976. Slightly less than two weeks later, on April 17, 1976, officers of the Immigration and Naturalization Service arrested two co-conspirators in the apartment, Jero and Toto. Jero and Toto had been at 132-65 Pople Avenue on February 19, 1974, the same day Mario and Estella Navas had been there. On March 5, 1974, Jero had been seen with Mario Navas while the latter was packaging cocaine and was later seen packaging cocaine himself. (Tr. 526-27, 567, 950, 991-93). In the apartment, the INS agents seized one and one-quarter kilograms of cocaine, a scale, lactose, $2,700, a 9 mm pistol, miscellaneous papers, 90 pounds of marijuana and a marijuana press. (Tr. 567-76). In addition, they seized an address book which listed Jero's apartment as the one where Mario and Estella Navas lived, 80-15 41st Avenue, Apartment 242, and the telephone number of such apartment listed next to the name Mario. (GX 44A).

b. Codes And Colombian Contacts

Mario and Estella Navas and Juan Mesa were not the only co-conspirators distributing narcotics in early 1974. Mono and Mejias also worked closely together selling cocaine. Indeed, Mejias introduced Mono to Oscar Perez, a licensed importer, shortly after Mono had taken up residence in Manhattan, with the intention of using Perez as Mono's agent to import trailer truck loads of contraband from Colombia. Moreover, the introduction was fruitful. Perez handled arrangements which resulted in the arrival of two trailer truck shipments. (GX 406, 407).*

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* While there was no direct proof that the trailers contained contraband, the jury could reasonably infer that they did. When Mono was introduced to Perez, he used the alias "Elkin Diaz"

[Footnote continued on following page]

In addition, Mejias and Mono met often to discuss their narcotics business at each other's apartments. On March 20, April 1 and 2, Mono and Mejias were seen together at or near 215 East 64th Street. (Tr. 1403-15, 1431-32). On May 13, 1974, Mejias ordered three kilograms of cocaine from Mono, picked it up in the morning on the following day and returned to his apartment at 445 West 48th Street in Manhattan. (Conv. 376, 5/13/74; Conv. 379, 5/14/74; Tr. 1611, 1404). Later, Mejias distributed the cocaine, paid Mono and he and Mono each went that day to his respective bank with his profits. (Conv. 389, 5/14/74; Tr. 1885-86; GX 276).

During the month of May, conversations intercepted on Mono's telephone at Apartment 10F, 215 East 64th Street, showed that Mono and Mejias received narcotics from Colombia and that Mono shipped to Colombia tens of thousands of dollars at a time in payment for the drugs. In addition, the wiretaps proved that the co-conspirators used each other's apartments to conduct business. For example, Mario Navas used Mono's telephone in a call to Spain in which he, Mono and the contact in Spain discussed their narcotics business. Among other things, they discussed the cost per kilogram of cocaine in Miami, Chicago and New York City and the need to send a courier to Miami to pick up a new shipment of cocaine

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and told Perez he would not give him a telephone number where he could be contacted. When Perez inquired what business Mono was in, Mono replied importing of furniture. (Tr. 1700-05). Furthermore, the trailer loads were declared to contain furniture valued at only a few thousand dollars, hardly enough to provide a return of sufficient magnitude to cover all costs and leave a reasonable profit for the effort involved. (GX 406, 407). In any event, a later conversation of Mono indicates that there was something in at least one trailer truck size container which might have made Perez too nervous to unload it. (Conv. 211, 5/9/74).

waiting for them. (Conv. 231, 5/10/74). Moreover, the conversations established that Estella Navas was not merely the innocent wife of Mario Navas. Indeed, on one occasion, while Mario Navas was out meeting a customer, Estella Navas had a conversation with Mono in a code which she obviously understood fully. In it, Mono asked her to tell Mario Navas not to further dilute cocaine which Mario Navas had received from Mono. (Conv. 565, 5/20/74). As is apparent, when Mario Navas needed cocaine, he did not hesitate to turn to Mono to resupply him. (Conv. 640, 5/22/74).

Mono also used the Navas' apartment. In May, Mono, Mario Navas, Vasquez and co-conspirator Walter Rodriguez had a meeting at Mario and Estella Navas' apartment. By this time, Mario and Estella Navas had moved to 61-25 98th Street in Queens after living at 80-15 41st Avenue in Queens less than eight months. (Tr. 1871-72).

Between May 27, 1974 and June 28, 1974, Mono was in Colombia making arrangements to ship narcotics to the United States. (Conv. 10, 6/28/74).

c. The Insulated Importers

In July, 1974, evidence was obtained which demonstrated that the importers in the organization had the resources to import a minimum of four kilograms of cocaine each per week and to sell it as soon as it arrived. On July 7, 1974, a co-conspirator Daniel Torres received in Germany from Juan Mesa approximately two kilograms of cocaine concealed in two false-bottom suitcases specially designed for the purpose. He then carried the cocaine from Germany aboard Lufthansa Flight Number 408 to Kennedy International Airport in New York, for delivery to Mario Navas. Before Torres' arrival, Mario and Estella

Navas checked with Lufthansa at Kennedy Airport to determine the arrival time of Flight 408 and when Torres arrived, Estella Navas was at the airport. Before leaving the airport, Torres made a telephone call and asked for "Mario." Immediately after completing the call, Torres travelled to 53rd Street and Roosevelt Avenue in Queens, there to meet Mario Navas who was seen waiting across the street. However, before Mario Navas could pick up the cocaine, Torres was arrested. (Tr. 955-57, 996-99; Conv. 441, 452, 7/6/74; 465, 7/7/74). Afterwards, Mario Navas telephoned Juan Mesa in Germany and gave him the details of the arrest he had witnessed, warning Mesa to move to another hotel. (Conv. 500, 7/7/74).

On July 4, 1974, Mario and Estella Navas were expecting a delivery of cocaine from Raul Diaz and Carmensa Gomez but their departure for New York from South America was delayed because of problems with obtaining false passports and with fitting Gomez with an inconspicuous body belt. Conv. 119, 124, 7/1/74; 208; 7/3/74). As a result of the Torres mishap and Diaz/Gomez delay, by July 10, 1974, Mario and Estella Navas had to reach out to another source to replenish their supply of cocaine. This time they contacted co-conspirator Hugo Diaz. On July 10, 1974, and near Second Avenue and 60th Street in Manhattan, they purchased from him approximately one-half kilogram of cocaine. (Tr. 1092-95, 1099; Conv. 618, 621, 659, 686, 689, 7/10/74). After the transaction was completed, Hugo Diaz went his own way and Mario and Estella Navas delivered the cocaine to their third stash apartment, located at Apartment 4G, 59-21 Calloway Street, Queens. When they arrived, Estella Navas, accompanied by Mario Navas, carried the cocaine into the building. Shortly afterwards, she and Mario Navas returned to their residence at 61-25 98 Street. (Tr. 1124-25).

On July 11, 1974, Raul Diaz and Carmensa Gomez finally arrived at Kennedy Airport where they were searched and arrested. Carmensa Gomez was carrying cocaine in a body belt and both she and Raul Diaz, Colombians, were carrying false Venezuelan passports. (Tr. 1154-68).

On July 13, 1974, in a period of only seven days, Mario and Estella Navas would have received their third international shipment of cocaine, if, up to then, all had gone according to plan. However, on July 13, 1974, the Navas' next courier, co-conspirator Maria Moreno, was not immediately admitted into Canada after flying into Toronto. On July 14, 1974, one day after her arrival in Toronto by way of Central America and the West Indies, Maria Moreno was admitted into Canada and arrested by the Royal Canadian Mounted Police after passing through customs carrying approximately one kilogram of cocaine packed inside specially designed wooden coat hangers. (Tr. 1478-84).

The seizures of cocaine from Daniel Torres, Carmensa Gomez and Raul Diaz and Maria Moreno were all effected on the basis of information received during the wiretap on defendants Mario and Estella Navas. That information unquestionably established that each delivery was destined for resale by them.

The loss of four kilograms of cocaine with a wholesale value of nearly $100,000 seemed hardly to disturb Mario Navas, but it did prompt Mono, who was aware of the shipments and who discussed the losses with Mario Navas, to warn him to take Estella Navas and his child to Florida until the passage of time dissipated the danger that a courier might lead the police to him. (Conv. 10, 6/28/74; 834, 7/13/74). Although Mario Navas did not leave New York, within less than two weeks of his conversation

with Mono, on July 26, 1974, he and Estella Navas prepared to move to a new apartment, signing a lease for Apartment B-204, 61-20 Grand Central Parkway in Qpeens, with tenancy to begin August 1st. (GX 212).

During the time the arrangements were being made to receive the above deliveries of cocaine, as well as afterwards, Estella Navas received from and gave instructions and messages to contacts in Germany and South America as well as from and to those who were customers of her and her husband, continuing to fulfill the responsibilities of the role she had taken in the organization. (Conv. 92, 94, 1/5/74; 769, 2/8/74; 926, 2/11/74; 1711, 2/26/74; 297, 3/18/74; 370, 3/19/74; 565, 5/20/74; 604, 5/21/74; 10, 6/28/74; 124, 7/1/74; 452, 7/6/74; 380, 393, 8/1/74; 195, 8/21/74; 742, 9/2/74).

d. The Common Interest-Having a Ready Source

While Mario and Estella Navas were moving large quantities of narcotics in the spring and summer of 1974, Mejias and Mono were doing the same, usually independently of each other but occasionally with each others assistance. Thus, records seized from a safety deposit box of Mejias indicate he made large deposits into it regularly in May, in July and in August. The last deposit indicated was made on August 27, 1974, merely a week before his arrest. Altogether, his records show safe deposit box deposits totalling $36,700, of which $26,700 in cash was remaining in the box at the time of the search. (GX 276, 572, 573A-B). In addition, records seized in his apartment at the time of his arrest show he took at least three trips to Miami, Florida, to receive deliveries of cocaine, one prior to June 6, 1974 (GX 100-8-T), one in July, 1974 (GX 100-7C) and a final trip on August 23, 1974. (GX 100-7).

Beginning in the last week in August and continuing through September 3, 1974, all the appellants worked closely together. On August 23, 1974, Mejias met Salazar in Miami. (GX 100-7; Tr. 3129). Three days later, on August 26, 1974, Mejias and Salazar left Miami and returned to New York where Salazar checked into the Skyline Motor Inn with defendant Padilla. (GX 271-73, 100-7). Once again, Mejias brought cocaine to New York for sale and the very next day he deposited $10,000 into his safe deposit box. (GX 276, 572). At the same time, Salazar opened a bank account in the same bank using the name "Francisco Cadena," listing Mejias' apartment as his address. (GX 279).

Following his arrest, Salazar said that August 23, 1974 was his first time in the United States and the first time he met Mejias. (Tr. 3129). The credible evidence proved otherwise. Salazar was in the United States prior to November of 1973 when he and his wife, Clavelia, met and travelled with Mejias. (GX 100-6). Once Salazar's true name was established to be Carlos Julio Bello Valenzuela, (Tr. 1755-60, 1792-93; GX 401, 415, 416), it was clear not only that he had a long standing relationship with Mejias prior to August 23, 1974 but that it was a relationship in the narcotics business. Moreover it became clear that in the organization, he had a higher position than that of Mejias, operating principally out of Colombia. In June, 1974, Mejias wrote Salazar a letter in which, among other things, he recounted a recent trip to Miami where he had received from "Rafael" 4 1/4 kilograms of cocaine ("four whole children, plus a fourth . . . 17 little packages"). He also stated he had four more kilograms of cocaine stored, and asked for Salazar to give him instructions. In addition, he advised Salazar not to write him at the "convent" where he lived because a new Rector insisted on distributing the mail himself. He then reported to Salazar that three couriers delivered 12 kilograms of cocaine that week ("three ladies with twelve

children") and that the price paid per kilogram was $21,000 ("he pays 21"). Finally, Mejias recounted how his business expenses had caused him to borrow money, including $50 from defendant Rojas ("Botellon"), among others. (GX 100-8-T).

On August 29, 1974, three days after Salazar checked into the Skyline Motor Inn with Padilla, Mejias went there for a meeting. (Tr. 2430, 2729). The very next day, August 30, 1974, at approximately 10 A.M., another meeting took place at the Skyline Motor Inn, between Mono, Mario Navas, Padilla and Mejias. Prior to the meeting and before Mejias joined them, Padilla had arrived in an automobile with Mario Navas and Mono, thereby establishing he had a relationship with Mono and Mario Navas which was not dependent upon the presence of Mejias. After the meeting, Mario and Mono departed together, followed a while later by Padilla and Mejias. (Tr. 2799-2805). Records found in Mejias' apartment on September 3 show accounts for August 30 relating to three separate transactions totalling $58,500, each of which identified customers other than the co-conspirators with whom Mejias met that day. (GX 100-7).

Salazar was also negotiating with his co-conspirators on August 30th. Thus, that evening Salazar called for Mario Navas at the latter's apartment and in a very guarded conversation was told by Mono that Mario Navas was not in but had gone out to collect money. A few minutes later, Salazar called again, spoke to Mono, and asked Mono to tell Mario that they would not meet that evening but would reschedule the meeting for August 31st. (Conv. 580, 581, 8/30/74). On August 31, Salazar and Mario Navas planned a meeting for 9:30 A.M. (Conv. 593, 8/31/74) at which Mario Navas delivered $22,785 as part payment for 2 kilograms of cocaine he had previously received from Salazar, Mejias and Padilla. (Conv. 624, 8/31/74; GX 100-7, 101A, 103B, 103D).

Later, on August 31, Salazar went to Miami, (Conv. 641, 652, 8/31/74; cf. Tr. 3129). On the same day, Mejias spoke to Mario Navas about the $22,785 Mario had previously delivered and about an additional payment of approximately $11,400 which Mario Navas was planning to deliver. In addition, Mario Navas ordered more cocaine but was told by Mejias that there was none left. (Conv. 624, 8/31/74). Later, Mario told Mejias he and Mono would meet with him. (Conv. 641, 8/31/74).

The meetings and conversations continued. On either August 31 or September 1, 1974, Padilla accompanied Mejias to the latter's apartment where he collected $30,535 which he then carried in a brown American Tourister attache case to the room at the Skyline Motor Inn where he and Salazar had been living. (Tr. 2128-31; GX 104A, 271, 271A, 560, 561).

On September 2, 1974, Salazar returned to New York City from Miami. (Tr. 3129; Conv. 754, 9/3/74). On September 3, Mario Navas delivered $11,750 to Mejias at his apartment in a red plastic bag as an additional partial payment for narcotics he had purchased earlier. (Tr. 2220-22; GX 100-7, 100-20). However, Mario Navas purchased only a small fraction of the cocaine which Mejias, Salazar and Padilla sold at that time. Records for September 2 recovered from an open sofa bed at the time of a search of Mejias' apartment show sales of 15 kilograms of cocaine for an amount totaling $273,450. The sales were made to, among others, defendants Ramirez ("Hugo", 3 kilograms), Rojas ("Botellon", 1 kilogram) and Mario Navas ("Mario", 2 kilograms). (GX 100-7). Padilla's interest in these sales was indicated by his possession at the time of his arrest of virtually the same records. (GX 103B, 103D). Indeed, Padilla's profits from the narcotics business were very substantial. On September 3, 1974, he deposited $20,000

into his checking account. (GX 277A). Afterwards, he went to Mejias' apartment with Valenzuela and Mejias and met Salazar who was already in the apartment. Once there, he and the three others began to count $108,149 which was later found in seven different locations in Mejias' apartment. (GX 107).

e. Wholesale Operations—Fall 1974

During the period described above, while Mono met and negotiated with Mejias, Padilla and Mario Navas, Mono continued to rely on his wholesalers, the defendants Rojas and Ramirez and the stash apartments they kept for him. Apartment 6A, 327 West 30th Street was one of Mono's stash apartments and on the evening of August 29-30, 1974, Mono had a meeting there with Mario and Estella Navas to deliver to them narcotics which Mario Navas had ordered earlier in the day by telephone from Rojas and Mono. At the time Navas placed his order, Rojas and Mono were in the 30th Street apartment. (Tr. 2128, 2191, 2203, 2213; Conv. 511, 8/29/74).

Four days later, on September 3, 1974, Rojas was using Apartment 6A, 327 West 30th Street again. (Tr. 2209, 2131-33, 2215-16). Rojas was unquestionably a close associate not only of Mejias [he was a customer of Mejias, as indicated above], but also of Mono. (Conv. 321, 3/18/74; 106, 5/6/74; 511, 8/29/74; 763, 9/3/74). Thus, on May 8, 1974, Rojas, who spoke broke English, was seen using the telephone in Mono's apartment at 315 East 64th Street in Manhattan as he repeatedly tried to place a call for Mono to Colombia. (Conv. 199, 202-05, 5/8/74; Tr. 2785-89). Moreover, Rojas received distribution from Mono much of the narcotics which he sold and he stored it in Apartment 6A, 327 West 30th Street. (Conv. 649, 8/31/74; 699, 9/1/74; 754, 9/3/74; 822, 9/4/74).

Mono also relied on "Hugo" Ramirez, another one of his wholesalers. On September 1, 1974, Ramirez spoke to Mono, who was then using Mario and Estella Navas' apartment, about payments he had made for earlier purchases of narcotics as well as payments he had yet to make. During this conversation, they planned to meet the following day, on September 2, 1974, at Apartment 6A, 327 West 30th Street. (Conv. 699, 9/1/74). While Rojas and Ramirez were each known to use Apartment 6A to conduct their narcotics business, it is clear that they also used Ramirez' apartment to store cocaine and that on September 3, when they were arrested, they still had a supply of cocaine in Ramirez' apartment. (Conv. 840, 860, 9/4/74).

Mono's practice was to convert the proceeds of his narcotics sales into money orders so the funds could more easily be carried or mailed to Colombia. (Navas-Ramirez Br. 29). Indeed, he often relied on his co-conspirators to assist him in buying them. Thus, on May 10, 1974, Mono was joined by Mario and Estella Navas and Carlos Vasquez who, in relays, entered at least two different banks on the upper east side of Manhatan, not far from Mono's residence, to purchase money orders with the proceeds of the narcotics business. (Tr. 1895-1901; GX 521, 522). Indeed, Mono had on one occasion, in less than 1 1/2 hours, laundered $60,000 into money orders in this fashion. (Conv. 699, 9/1/74). Moreover, Mono taught his wholesalers the way he preferred his money laundered. Accordingly, the Gills and Ramirez paid him with money orders. (GX 452, 453, 500).

Mono used several wholesalers and by doing so managed, as did Mario and Estella Navas, to disperse his store of cocaine to several locations. In addition to Rojas and Ramirez, two of Mono's most successful wholesalers were Carmen and Libardo Gill of 580 Amsterdam Avenue,

Manhattan, dealers who were known not only to Mono but also to Mario Navas, (e.g., Conv. 145, 5/7/74), Mejias, (e.g., 479, 5/17/74) and Ramirez. (GX 456A, 474). The Gills' narcotics business was operated on behalf of Mono and it was very successful. Consequently, Libardo Gill and Mono met frequently at each other's apartments. (Tr. 1871, 1885-86, 2000-01; GX 311). In addition, they frequently had conversations about the narcotics business by telephone. (e.g., Conv. 396, 5/14/74; 427, 5/16/74; 627, 5/2 /74; 766, 5/27/74). Indeed, the business Carmen and Libardo Gill ran was so voluminous that it was necessary for them to keep accurate records of their customers and the amounts of marijuana and cocaine they sold as well as of payments they owed or made to Mono. (GX 454, 455).

These records indicated massive sales on March 9, April 8 and 15, May 20 and July 3, 8 and 10, 1974. On July 10, 1974, Libardo Gill was seen transporting a package of cocaine. (Tr. 1888). The records also indicated that, on at least two occasions, Mono had been paid $30,000 (GX 454 B-1) and $21,000 (GX 455 D-1) and that on one occasion, Alberto Bravo had been paid $131,200. (GX 454E). One document recorded twenty-two sales of ⅛ kilogram amounts of cocaine at an average price of $4000, another seven sales of ½ kilogram quantities of cocaine at an average price of $13,000 and one sale of 1 kilogram of cocaine for $26,500, aggregating total payments of $205,500. (GX 454C).

3. The Importing/Wholesaling Operation is Destroyed—Arrests and Seizures

On September 3, 1974, Mono and Ramirez were arrested on the street in Queens near Mario and Estella Navas' apartment. On the same day, Mejias, Padilla, Salazar and Valenzuela were arrested in Mejias' apart-

ment on West 48th Street in Manhattan and Rojas was arrested on 30th Street in Manhattan, shortly after leaving Apartment 6A at 327 West 30th Street.

Mono and Ramirez were arrested with a third co-conspirator, Palitraque, as they were meeting for Ramirez to transfer $10,000 of narcotics proceeds to Mono. Ramirez was carrying $10,000 in blank money orders and the telephone number to Apartment 6A, 327 West 30th Street. (GX 500, 503).

At approximately 4:45 P.M., on September 3, Mejias, Padilla and Valenzuela arrived at Mejias' apartment in a taxi. Within a matter of a few minutes, Detective Vincent Palazzotto, accompanied by three other officers, ordered Mejias arrested at his apartment door but was forced to enter the apartment to effect the arrest. Immediately upon entering the apartment, Detective Palazzotto saw Padilla and Salazar rise from an open sofa-bed on which they had been counting money with Valenzuela and Mejias. On the bed with the money were records which listed, among others, Mario Navas ("Mario"), Mono ("Mono"), and Rojas ("Botello") as purchasers of cocaine Mejias, Padilla and Salazer had imported. (GX 100-7, 100-7A, 100-7B). One of the records listed a total of $81,000 due for sales on July 20, 1974, $48,000 of which (payment for 2 kilograms of cocaine), was receivable from Mono. (GX 100-76).

The money on the bed and in six other locations around the apartment totalled $108,149. (GX 100-16—100-24). In the trash can were fourteen empty bags, each of which contained a residue of cocaine. In the kitchen cabinets were, among other things, five bottles of lactose, plastic baggies and a heat sealer. (GX 100-4, 100-9-9L, 100-10, 100-14-14D). Moreover, a personal photo album of Mejias seized from the apartment con-

tained photographs of him with Mario Navas, Mono, Salazar, Jero and Toto. (GX 100-6).

After his arrest, Salazar volunteered that the red plastic bag Mario Navas had brought to Mejias earlier that day was his (GX 100-20), and that Padilla had loaned Salazar $20,000. Padilla responded, "Yes, I loaned him $20,000." (Tr. 2905).*

On his person, Salazar and Padilla each carried notations of accounts. Salazar had a notation of the $22,785 paid by Mario Navas for one of the two kilograms of cocaine he had purchased one or two days before, (GX 101A), as well as a card containing Padilla's name. (GX 101C).

Padilla carried a telephone book which contained the Colombian address of Salazar ("Carlos Bello") and the Panama City address of Valenzuela (GX 103A), as well as a sheet of paper with the telephone numbers of Mario Navas and Mejias, in code. (GX 103C). In addition, Padilla carried two separate pieces of paper which contained, in code, the names of the persons who had purchased the cocaine listed in the accounts for September 2 found on the open sofa-bed (GX 100-7) as well as the dollar amounts of their purchases, including the $22,785 figure relating to the cocaine purchased by Mario Navas. (GX 103B, 103D).

Two seizures were made following the above arrests. From Room 327 at the Skyline Motor Inn where Salazar and Padilla had been living, the police seized a brown American Tourister attache case, identical to the one

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* Later, when interviewed by an Assistant District Attorney, Salazar denied the contents of the red bag were his but admitted to ownership of another bag containing $14,000. (Tr. 3131).

Padilla had carried into the room between August 31 and September 1, containing $31,535. (Tr. 2994-99; GX 560, 561).

From a safe deposit box in the name of Mejias, the police seized $26,700; a list of deposits; and two passports, one United States passport which identified Mejias as a Puerto Rican, and a Colombian passport which identified him as Bernardo Ignacio Roldan Mejia. (GX 570-573B). The Colombian passport was a cleverly constructed counterfeit made from parts of two passports. (Tr. 2650-71, 3737-52).

Shortly before Mejias was arrested, Rojas was seen leaving Apartment 6A, 327 West 30th Street and outside he was placed under arrest. In Apartment 6A, the police seized three pairs of false bottom shoes containing traces of cocaine, $10,900 in cash, a bag of white powder, photographs of Rojas, marijuana and various documents. (GX 525-55). Moreover, the police seized a Colombian passport of Rojas in the name Henry Cifuentes Rojas. (GX 556). This passport was also a counterfeit passport, identical in its method of alteration and assembly to that found in Mejias' safe deposit box. (GX 556A-C; Tr. 2650-71, 2737-52).*

On September 30, 1974, two detectives who were conducting a homicide investigation were invited into the apartment of Libardo and Carmen Gill, 580 Amsterdam Avenue, Manhattan, and arrested them for possession of marijuana cigarettes which were near a table at which they had been counting a large sum of money. The Gills

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* At the trial, in the presence of the jury, Rojas' counsel stated the defendant's true name was Juan Jose Plata (Tr. 94), coincidentally the account name on a blank check seized in apartment 6A, 327 W. 30th Street. (GX 548).

subsequently offered a $21,000 bribe in an attempt to induce four police officers not to arrest them. The apartment contained over $70,000 cash, $70,000 in blank money orders, $70,000 in money order receipts, one-half kilogram of cocaine, nineteen pounds of marijuana, a calculator, records of narcotics transactions and the usual narcotics paraphernalia. (GX 450-477). The records prominently referred to Mono ("Don Francisco") as being owed or having been paid over $50,000. (GX 454, 455). In addition, the Gills had a telephone book which listed "Hugo" next to the telephone number of defendant Ramirez and a home movie film which showed the Gills, Ramirez and an unknown female dancing in a private apartment. (GX 456A, 474).

Finally, the investigation closed October 4, 1974 with the arrests of Mario and Estella Navas and the search of their stash apartment at Apartment 4G, 59-21 Calloway Street in Queens. Mario Navas was arrested outside his apartment. He said his name was Isidoro Colon and that Apartment B-204, 61-20 Grand Central Parkway was not his residence. When he was inside his apartment, he again denied it was his residence. Estella Navas was arrested in the apartment but she also denied living there. In addition, she denied being the parent of the child in the apartment (at sentencing, she and Mario Navas admitted that the child was theirs). (Tr. 1246, 1260, 1263-65). In their apartment, Mario and Estella Navas had extensive records of narcotics transactions, including one notation listing the name Carmensa Gomez, the courier arrested with Raul Diaz at Kennedy International Airport on July 11, 1974, false identification for Estella Navas, photographs of Mario and Estella Navas with Jero and Juan Mesa, a scale, approximately one pound of cocaine, lactose and approximately 10 pounds of marijuana. (GX 200-235A).

The stash apartment which Mario and Estella Navas used at 59-21 Calloway Street was also searched on October 4, 1974. Co-conspirator Walter Rodriguez who watched the apartment for the Navases was arrested in the apartment prior to the search. (Tr. 1124-26, 1200-01, 1197-99; Conv. 659, 7/10/74; Conv. 80, 8/18/74, Conv. 737. 9/27/74). At the time, he was guarding a narcotics and marijuana factory containing six containers of lactose or other cocaine dilutant, two scales, a marijuana press with a 30 ton capacity and nearly 300 pounds of marijuana. (GX 80-81A, 84-89A).*

The Defense Case

None of the defendants testified on their own behalf and only three of the defendants, Rojas, Padilla, and Valenzuela, offered a defense.

Rojas' defense was that he could not have been identified at the locations where the Government's witnesses said they had seen him because it was impossible to identify anyone from where Government witnesses testified they had made the observations. William Mulligan of the New York City Police Department testified that on September 3, 1974, he was in Apartment 6B at 327 West 30th Street, in Manhattan conducting a surveillance of the apartment immediately across the hall, Apartment 6A, by keeping his eye to the peephole of the door to Apartment 6B. At approximately 3:40 p.m. that day he observed Rojas exit Apartment 6A. (Tr. 2208-09).**

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* A semi-automatic .30 caliber rifle and a pistol were also seized in the apartment but were excluded from evidence. (GX 82, 83).

** In addition to this observation, there was other evidence that Rojas used Apartment 6A. Rojas was overheard in a retapped conversation prior to which the telephone number of Apartment 6A had been dialed (Conv. 511, 8/29/74) and documents seized in the apartment contained Rojas' photograph or other identifying characteristics. (GX 533-55).

To rebut this testimony, Rojas called Ralph Addanizio, a private investigator, who testified about observations he made in June, 1976 of the entrance to Apartment 6B, (the apartment door *through which* Officer Mulligan made his observations of Rojas) through the peephole of the door to Apartment 6A (the apartment door *at which* Officer Mulligan had seen Rojas). Addanizio's observations, therefore, were not only made nearly two years after Officer Mulligan had made his observations but were made in the reverse direction. Over the objection of the Government that no foundation had been laid to establish that the peephole in the door to Apartment 6A was the same as that in 6B or that either was the same in 1976 as those existing in 1974, a photograph was received into evidence allegedly showing the outer limits of vision through the peephole in the door of Apartment 6A. (Tr. 3471-3512). On voir dire and cross-examination, however, Addanizio admitted that there was no way of knowing the actual condition of the peephole in the door in Apartment 6B from where the observation of Rojas had been made in 1974 or whether, in fact, it was a similar peephole to that in the door of Apartment 6A. (Tr. 3487). Indeed, Addanizio acknowledged that the door in Apartment 6A may have been askew, causing a distortion of the view through its peephole. (Tr. 3529-31). Moreover, at any rate, in addition to failing to establish that the conditions at the time of his observations were the same as those existing when Officer Mulligan made his, Addanizio conceded that in looking through the peephole of the door to Apartment 6A, one could see the head and shoulders of an individual standing in front of the door to Apartment 6B. (Tr. 3533-36).

Another Government witness, Police Officer Federico Roman, of the New York City Police Department testified that on May 8, 1974, he was on surveillance duty at the

Manhattan Eye, Ear, Nose and Throat Hospital, in a room directly across from Mono's residence, Apartment 10F at 215 East 64th Street. He testified that at approximately 9:55 p.m., using binoculars, he saw Rojas in a room of Mono's apartment on the telephone which was then being monitored from the wiretap plant in the hospital. This observation was significant since it provided a circumstantial voice identification of Rojas. (Tr. 2785-99; Conv. 199, May 8, 1974).

To rebut this testimony, Addanizio testified that in June, 1976, he went to 215 East 64th Street, located Apartment 10F, and examined it from the roof of the Manhattan Eye, Ear, Nose and Throat Hospital across the street. However, in examining the photographs of Mono's apartment building, Addanizio incorrectly identified Apartment 10F as having french windows. (Tr. 3497-3512, Plata's Exhibits J, K, L and M). Moreover, on cross-examination, Addanizio acknowledged that he did not know from where the pictures had been taken and that he did not conduct any experiments to determine if by using binoculars, as the Government witness had done, one could actually identify an individual in Apartment 10F from his vantage point.

Padilla's case consisted solely of entering into evidence a copy of a check, for $50,000, which Padilla had deposited in his checking account in March, 1974, after winning that amount in the New York State Lottery. (Tr. 3543; Padilla Ex. C).

Valenzuela's case consisted merely of entering into evidence an Atlas to show that Panama and Colombia are contiguous, apparently to demonstrate that Valenzuela's trips between Panama and Colombia as reflected by her passport may have been to visit relatives. (Tr. 3543, 3934; Valenzuela Ex. A).

ARGUMENT

POINT I

Defendants Were Not Deprived Of Their Right To A Speedy Trial.

Defendants contend that Judge Carter erred in failing to grant their motions to dismiss the indictment on the ground that their speedy trial rights were violated under Rule 5 of the District Court's Interim Plan Pursuant to the provisions of the Speedy Trial Act of 1974 (Padilla Br., Point IV; Navas—Ramirez Br., Points I and V); the Sixth Amendment of the United States Constitution (Navas—Ramirez Br., Points I and V; Salazar—Mejias Br., Point II): and Rule 48(b) of the Federal Rules of Criminal Procedure (Salazar—Mejias Br., Point II). Mario and Estella Navas and Ramirez further contend that error was committed by Judge Carter's refusal to hold a hearing on the speedy trial issue. (Navas—Ramirez Br., Points II and V).* In addition, Mejias, Salazar, Ramirez and Mario and Estella Navas assert that Judge Carter erred in failing to grant their motions to dismiss the indictment on the grounds of pre-indictment delay in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. (Navas—Ramirez Br., Points III and V; Salazar—Mejias

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* Salazar and Mejias seek a remand for a hearing if the Court should deem it necessary but they do not argue that Judge Carter erred in denying a hearing. (Salazar-Mejias Br. 61-62).

Br. Point II).* All of these claims are totally without merit.

* These claims of denial of a speedy trial and of pre-indictment delay were first raised by the defendant Padilla prior to March 30, 1976. On March 30, Judge Carter convened a pre-trial conference at which all counsel were present except Michael Stokamer for Mario Navas. At that time Judge Carter specifically stated that any remaining defense motions must be filed by April 1, 1976 and that no motions were going to be considered properly filed unless accompanied by a legal memorandum. (3/30/76 Tr. 20-2).

Estella Navas served on the Government an affidavit of counsel and a memorandum of law on April 16, 1976. On May 6, 1976, the Government filed an affidavit and memorandum in opposition to the motions of Padilla and Estella Navas. Mejias served on the Government an affidavit of counsel on May 14, 1976. Judge Carter permitted the other defendants to join in these motions. On May 17, 1976, Judge Carter found that the speedy trial motions of all defendants except Padilla were ". . . defective as a matter of law" (H. Tr. 226) and that the Government had met its burden in rebuting the defendants' claims. (H. Tr. 210). Although holding that there was no need for a hearing on this issue, the court told counsel for Mario Navas that he would be given the opportunity to make an offer of proof. (H. Tr. 226). Counsel for Mejias was subsequently told he would have the same opportunity. (H. Tr. 476). Defendants made such offers to the court on May 18th (H. Tr. 428-55), May 19th (H. Tr. 457-64) and May 21st (H. Tr. 957-1020). At the conclusion of the defendants' presentation, Judge Carter requested that the Government file affidavits from New York County Assistant District Attorney Lawrence Herrmann and Assistant United States Attorney Bancroft Littlefield, Jr. concerning the genesis and operation of the joint federal-state investigation which preceded the indictment in this case. (H. Tr. 1017). These affidavits were submitted to the court on June 3, 1976 and on June 10, 1976. The latter affidavit had annexed to it two memoranda which were submitted to the court *in camera*. (Tr 1134). Counsel for Mejias also submitted to the court a handwritten, undated affidavit citing facts from a transcript of a state hearing relating to the investigation of the defendants in this case. On June 21, 1976, Judge Carter filed an opinion and order denying the defendants' motions and finding that there was no violation of the defendants' Fifth and Sixth Amendment rights or of Rule 5 of the District Court's Interim Plan pursuant to the provisions of the Speedy Trial Act of 1974. *United States* v. *Mejias*, 417 F. Supp. 585 (S.D.N.Y. 1976).

A. Procedural Background

The investigation leading up to the arrests and indictments of the appellants was begun in the summer of 1973 by the New York City Police Department. That investigation included controlled narcotics buys, accomplished through undercover agents and informants, as well as electronic surveillance ordered by a state court. This electronic surveillance was conducted intermittently from January 2, 1974, to October, 1974. In the spring of 1974, Lawrence Herrmann, an Assistant District Attorney for New York County, learned that certain targets of the street investigation by the New York City Police Department were also targets of a federal Grand Jury investigation being supervised by Bancroft Littlefield, Jr., then an Assistant United States Attorney in the Southern District of New York. The federal investigation had begun in March, 1974 and was not the result of information received directly or indirectly through the state investigation.

In order to coordinate city and federal prosecutorial efforts and to avoid duplicative prosecutions, on May 14, 1974, Frank Rogers, Special Assistant District Attorney, Office of Prosecution, Special Narcotics Courts, convened a meeting in his office of representatives of the United States Attorneys' Offices of the Southern and Eastern Districts of New York, the New York City Police Department and the Drug Enforcement Administration of the United States Department of Justice. At this meeting, it was agreed that the ongoing state street investigation was the most important and would take precedence over related federal Grand Jury conspiracy investigations and other overlapping New York City investigations. It was also agreed that the New York City prosecutor would prosecute defendants charged with substantive offenses and any co-conspirators it elected to prosecute and that federal prosecutors would prosecute co-conspirators not

prosecuted by the New York City prosecutor. The timing of any arrest was to be cleared first with the New York City prosecutor. (Affidavits of Lawrence M. Herrmann and Bancroft Littlefield, Jr., both sworn to on June 3, 1976).

Between September 3, 1974, and October 4, 1974, Mejias, Mario and Estella Navas, Padilla, Ramirez, Salazar and Rojas were arrested by New York City Police Officers for state violations. Special Agents of the Drug Enforcement Administration were present for all of these arrests.*

Although Special Agents of the Drug Enforcement Administration were present, it was Lieutenant Michael O'Shea of the New York City Police Department who made the decision to execute all of the arrests, which in turn were authorized by Assistant District Attorney Lawrence Herrmann. To the extent that federal agents participated in the arrests, they were under the command of Lieutenant O'Shea. The federal agents did not make any arrests, seize any evidence or detain any of the defendants. The role of the federal agents was limited to assisting the local police officers. Indeed, the defendants were specifically told that they were being arrested for violations of state law and their possible liability for federal violations was never mentioned. (H. Tr. 809-18, 820-32).

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* On September 3, 1974, Padilla, Mejias, and Salazar were arrested in Apartment 1B, 445 West 48th Street, New York, New York. On the same day, Rojas was arrested at the corner of 8th Avenue and 30th Street, New York, New York, and Ramirez and co-conspirator Mono were arrested on the street in Queens, not far from the residence of Mario and Estella Navas. A month later, on October 4, 1974, Estella and Mario Navas were arrested in Apartment B-204, 61-20 Grand Central Parkway, Queens, New York.

On September 19, 1974, the state and federal prosecutorial agencies entered into a formal agreement designating those persons who would be prosecuted by federal prosecutors and those who would be prosecuted by the New York City prosecutor. The defendants before this Court in this appeal were among those individuals who were to be prosecuted only by the New York City prosecutor. (Affidavits of Lawrence M. Herrmann and Bancroft Littlefield, Jr., both sworn to on June 3, 1976). Subsequently, all of these individuals were in fact charged in various state indictments.

Those defendants who were to be prosecuted by the United States Attorney's Office in the Southern District of New York were charged in Indictment 74 Cr. 939, filed on October 4, 1974. That indictment named twenty-nine individuals as defendants and identified, among others, Mejias, and Mario and Estella Navas as co-conspirators. Later that indictment was superceded by the filing of Indictment S75 Cr. 429 on April 30, 1975, which named thirty-eight persons as defendants and identified as co-conspirators, either in the indictment or in the Government's Bill of Particulars, approximately 400 persons, including all of the appellants.

A jury trial of twelve defendants on Indictment S75 Cr. 429, *United States* v. *Alberto Bravo, et al.*, commenced before the Honorable John M. Cannella, United States District Judge on October 20, 1975. It ended on January 23, 1976, with guilty verdicts against each defendant. At the conclusion of the *Bravo* trial, the Government initiated the Grand Jury investigation which culminated in the filing, on February 19, 1976, of the indictment in this case, Indictment 76 Cr. 164, *United States* v. *Rev. Alberto Mejias, et al.* The investigation was conducted because the state had informed the United States Attorney's Office in the Southern District of New

York that its ability to prosecute certain individuals successfully had been jeopardized when, on September 24, 1975, Liston Coon, a Justice of the Supreme Court of the State of New York, New York County, granted motions apparently made by Mejias, Padilla, Salazar and Rojas, among others, to suppress evidence seized at Apartment 1B, 445 West 48th Street, and Apartment 6A, 327 West 30th Street, New York, New York.*

Indictment 76 Cr. 164 encompassed not only the defendants who were affected by Judge Coon's granting of the suppression motion but also six other persons. It also covered a period of time beginning in January, 1972, one and one-half years earlier than the earliest date in any state charge against the defendants. In addition, the indictment identified many more individuals as co-conspirators than any state charge and was based not only on evidence which had come into the Government's possession from the state for preparation of the *Bravo* trial, but also on evidence which had been developed solely by Federal agents assisted by New York City police officerts acting independently of the original state-federal investigation.**

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* Though the state had reached such a conclusion, the only defendant whose prosecution arguably was seriously jeopardized as a result of Justice Coon's suppression decision was Valezuela. Against each of the other defendants, the state had evidence independent of the searches in the form of wiretaps, surveillances and seizures. All of this evidence, however, was not developed until shortly before the trial in this case began.

** The evidence seized at the time of the appellants' arrests was always considered the property of the state. Part of the evidence, including the original wiretap recordings, did not come into the possession of the Federal Government until nearly one year after the arrests of the defendants, when the original recordings and other evidence were subpoenaed by the United States District Court on behalf of the United States Attorney for the Southern

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B. Defendants Were Not Denied Their Rights to a Speedy Trial Under the Local Rules.

All of the defendants contend at some point that their rights under Rule 5 of the Southern District's Interim Plan pursuant to the provisions of the Speedy Trial Act of 1974 ("Interim Plan") were violated.* To make this argument, they vigorously assert that the Federal Government should be charged with their September 3rd and October 4th, 1974 arrests by the State of New York. Relying on that lynchpin, they argue that the provisions of the local rules required the Government to be ready for trial within six months of those arrests. This claim is legally unsupported and disregards the intended purpose of the local rules.

On the pivotal issue of the federal involvement in the arrests on September 3 and October 4, 1974, the court requested the Government to submit affidavits from Lawrence Herrmann, the Assistant District Attorney and

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District of New York, by court subpoenas *duces tecum*, dated September 3, 1975, specifically for use in the trial of Indictment S75 Cr. 429. It was received on September 4, 1975. Additional evidence was delivered to the Government on or about January 29, 1976, in contemplation of the Grand Jury investigation which led to the indictment in this case.

* Rule 5 of the Interim Plan provided in pertinent part as follows:

> "In all cases the government must be ready for trial within six months from the date of the arrest . . . or the filing . . . of a formal charge upon which the defendant is to be tried . . ., whichever is earliest."

This rule, which took effect on September 29, 1975, was identical to Rule 4 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases. This latter plan took effect on April 1, 1973. The Southern District is now governed by the Plan for Prompt Disposition of Criminal Cases which took effect on July 1, 1976.

coordinator of the state street investigation, and Bancroft Littlefield, Jr., the Assistant United States Attorney in charge of the federal Grand Jury investigation. (H. Tr. 1017). In addition, during the suppression hearing on the search of Mejias' apartment, Judge Carter permitted defense counsel to question various witnesses about the nature of the state-federal cooperation. (H. Tr. 109-14, 119-22, 150-52, 215-18, 576-79, 585-90, 612-13, 809-18, 820-32). On the basis of all of these facts and relying on the principal of dual sovereignty, Judge Carter found that there was no "clear showing of federal intrusion into, and control over state decision-making processes," and that, therefore, the arrests of the appellants were not federal arrests. *United States* v. *Mejias*, 417 F. Supp. 585, 591 (S.D.N.Y. 1976).

Defendants contest this finding by citing *Lustig* v. *United States*, 338 U.S. 74, 78 (1949) and *Stonehill* v. *United States*, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), contending that if federal officials "had a hand" in the arrest, then it is a federal arrest for speedy trial purposes. (Padilla Br. Pt. IV). These two cases are legally inapposite and factually distinguishable. In *Lustig* and *Stonehill*, the issue was not whether arrests were federal or state but whether the Federal Government's level of participation in unconstitutional searches by local police (*Lustig*) and foreign police (*Stonehill*) precluded the Federal Government from using the fruits of these searches in prosecuting federal crimes. Both of these cases were concerned with the problem that the Federal Government might circumvent the requirements of the Fourth Amendment by using the police authority of another sovereignty

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* *Lustig* was decided prior to *Mapp* v. *Ohio*, 367 U.S. 643 (1961) and *Elkins* v. *United States*, 364 U.S. 206 (1960) when the

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to conduct a search.* Here there is no suggestion or danger, as in cases like *Lustig*, that federal agents sought to avoid federal requirements by using state process. Rather than avoiding the federal speedy trial requirement, state and federal law enforcement officers here were merely attempting to make a sensible allocation of resources and avoid duplication of their efforts. To charge the Federal Government with the arrests in September, 1974, for purposes of the local rules, would not serve to further the salutary objectives of those rules at all. If the six month rule applied to state arrests in which the Federal Government participated to any extent, the Federal Government would be forced to seek to indict and to try persons arrested by the state or forever waive its right to prosecute such offenses. Such a result would not only defeat the goal of the six month rule by unnecessarily lengthening the court's calendar but also would reduce the benefits which society receives from cooperation between law enforcement officials and from the judicious exercise of prosecutorial discretion in cases where joint jurisdiction exists. From the defendant's viewpoint, the consequences would be equally undesirable. The number of charges against an individual would increase, requiring him to defend himself in two courts at a greater cost to himself, as well as to society. Finally, this kind of approach to a

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Supreme Court held that the Fourth Amendment to the Constitution was applicable to the states. More recently, this issue has arisen in the context of Rule 41 of the Federal Rules of Criminal Procedure. *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975). In *Burke*, this Court held that violations of Rule 41 by state officials in which the Federal Government had a hand in the search ". . . should not lead to exclusion [of the evidence seized in federal prosecutions] unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *United States* v. *Burke, supra*, 517 F.2d at 386-387.

state arrest flies in the face of the principle of dual sovereignty.*

Appellants' reliance upon *United States* v. *Cabral*, 475 F.2d 715 (1st Cir. 1973) to support their argument that the Federal Government should be charged with their 1974 arrests is totally misplaced. The *Cabral* opinion applies the speedy trial test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), to an alleged violation of the defendant's constitutional rights to a speedy trial. As such, the opinion has no relevance to the rationale for the enactment of the local speedy trial rules and cannot be used to support defendants' novel definition of an "arrest" as contemplated by such rules. "The purpose of Rule 5 is to insure that regardless of whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial *of the charge against him* will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the court and gaining the impression that *federal criminal laws* cannot be enforced." (emphasis added), *Hilbert* v. *Dooling*, 476 F.2d 355, 357-58 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973). Here the defendants were arraigned on state, not federal, charges and, as a result, there simply could have been no "paralytic" federal procedural delays. Without a federal charge, there also was no reason for the public to lose confidence in the ability of the federal courts to enforce federal criminal laws. Indeed, in this case, the public would have looked to the state to enforce the criminal laws,

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* This principal was enunciated by the United States Supreme Court in *United States* v. *Lanza*, 260 U.S. 377 (1922) in which the Court held:

> "[A]n act denounced as a crime by both national and state sovereignities is an offense against the peace and dignity of both and may be punished by each."

See also, *Abate* v. *United States*, 359 U.S. 187 (1959); *Karkus* v. *Illinois*, 359 U.S. 121 (1959).

particularly since, by express agreement with the state, no charges were to be filed against the defendants by federal authorities after their arrests in 1974. Thus, no purpose behind Rule 5 would be served by now charging the Federal Government with the arrests of the defendants in 1974. Moreover, to charge the Federal Government with state arrests of defendants in cases like this will not necessarily result in a more prompt disposition of possible federal charges. Under the rules presently in effect, the Federal Government could indict such defendants and move to have the indictments dismissed, thereby tolling the running of the time the Government has within which to try defendants. Title 18, United States Code, § 3161(h)(6); Plan For Prompt Disposition of Criminal Cases, Section 10(a) (S.D.N.Y. July 1, 1976).

Defendants' reliance on *United States* v. *DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973) is of no greater force. Indeed, the language of the court's opinion supports the Government's position:

> "It would be absurd in the extreme if an arrest on one charge triggered the Sixth Amendment's speedy trial protection as to prosecutions for any other chargeable offenses. Of course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses." *United States* v. *DiTienne*, *supra*, 468 F.2d at 155.

Moreover, there was no gilding of any change here. Gilding a charge refers to the situation where the sovereign that initially sought the charge adds to it, as by a superseding indictment. That clearly is not the case here where the Federal Government filed only one indictment and did so expeditiously after learning that the state prosecution was jeopardized.

C. Defendants Were Not Denied Their Sixth Amendment Right to a Speedy Trial

Defendants Mario and Estella Navas, Ramirez, Salazar and Mejias contend that their right to a speedy trial was violated under the Sixth Amendment to the United States Constitution and Rule 48(b) of the Federal Rules of Criminal Procedure. This argument is totally frivolous. Four criteria are to be balanced in determining whether a delay in trial so infringed on a defendant's rights as to foreclose further prosecution: (1) the length of the delay, (2) the reason for the delay, (3) prejudice caused the defendants by the delay and (4) the defendant's assertion of his right to a prompt trial. *Barker* v. *Wingo*, *supra*, 407 U.S. 514. Judge Carter properly found that all of the defendants failed to make a sufficient showing with respect to three of the four factors under this test. *United States* v. *Mejias*, *supra*, 417 F. Supp. 585.*

1. The length of the delay

Again, this argument hinges on the faulty assumption that the state arrests in September and October, 1974, were in fact federal arrests.** Although, as the District

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* Defendants first asserted their right to a speedy trial following their indictment in this case on February 19, 1976. However, while a defendant's failure to assert such a right for so long after his arrest is usually weighed against him, Judge Carter did not do so here since he found that they could not properly have asserted their right until they had been indicted by a Federal Grand Jury. *United States* v. *Mejias*, *supra*, 417 F. Supp. at 595.

** February 19, 1976 is the first day any of the defendants were "accused" of violating a federal criminal statute. *United States* v. *Marion*, 404 U.S. 307, 313 (1971). The fact that all of the defendants were named in Indictment 74 Cr. 939 as co-conspirators did not constitute an accusation in terms of any Sixth

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Court found, they were not federal arrests, even assuming that they were, the twenty and twenty-one month delays of which the defendants complain were hardly excessive. *United States ex rel. Spina* v. *McQuillan*, 525 F.2d 813, 818 (2d Cir. 1975) (26-month delay between indictment and trial deemed not extraordinary); *United States* v. *Lasker*, 481 F.2d 229, 237 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974) (two-year delay between indictment and trial deemed not extraordinary); *United States* v. *Infanti*, 474 F.2d 522, 527 (2d Cir. 1973) (28-month delay from arrest to trial deemed not extraordinary).

In *United States* v. *Vispi*, Dkt. No. 76-1250, slip op. 513 (2d Cir., Nov. 15, 1976), this Court recently held that a twenty-month delay between the filing of the information and commencement of the trial was excessive under the Sixth Amendment because the case was a simple misdemeanor prosecution and because there had been a four year investigation prior to the filing of the information which gave "the government ample time in which to investigate and marshall its evidence for an immediate trial following its filing of the information." *United States* v. *Vispi*, *supra*, slip op. at 521-22. Moreover, the Court found considerable prejudice including loss of evidence and loss of income to the defendant, who as an attorney suffered serious professional damage during the pendency of the case against him.

The contrast between *Vispi* and this case demonstrates the inappropriateness of the Sixth Amendment claim here. The instant case was extremely complex and resulted in

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Amendment right to a speedy trial. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." Clearly, an unindicted co-conspirator is not to be tried and is, therefore, not an "accused" within the meaning of the Sixth Amendment.

an unusually long trial. Furthermore, unlike the four year investigation in *Vispi* which preceded the indictment, the investigation here consumed only twenty-two months, at best, from May, 1974, when Federal and State authorities began to cooperate, to the date of the federal indictment. More realistically, the Federal Government should not be charged with the investigation of these defendants during the time between their arrests and September, 1975, when the State alone was planning their prosecution. Thus, the federal investigation lasted only ten months and it caused no unreasonable delay.

2. The reason for the delay

Even if the Court is unwilling to exclude that time during which the state was preparing to prosecute these defendants, the delay here was not unreasonable. Much of the evidence in this case consisted of Spanish language wiretap recordings of which official and complete transcripts of translations were never made until the Federal Government undertook to do so. Even then, the Government did not prepare a transcript of every conversation. It selected only those conversations which could best be used in prosecuting the defendants tried in the *Bravo* trial. That procedure began in January, 1975 and continued through the completion of the *Bravo* case in January, 1976. While many of the conversations used in that case were also used in the trial of these defendants, official transcripts had to be made of many additional conversations which related directly to these defendants. Thus, the time it took to prepare the conversations used in this case was at least fourteen months, from January, 1975 to February 19, 1976.

Unlike cases where the proof is in the form of witness testimony and exhibits, here, where there was no accomplice testimony and testimony of direct dealing

with only one of eight defendants, the government had to rely heavily upon the wiretaps. However, such evidence was not in a form intelligible to a jury as of the time of the arrests of the defendants. In light of the complexity of this case, and the nature of the Government's proof, the period of delay, even if calculated from the state arrests, can hardly be considered a delay at all. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 531. ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge").

3. There was no prejudice to defendants

In *United States* v. *Lara*, 520 F.2d 460 (D.C. Cir. 1975), cited by defendants Salazar and Mejias, the Court held that a delay of twenty months between the dismissal of a first indictment and the filing of an identical second indictment, brought by the same prosecutor, was excessive. Unlike this case, in *Lara* the delay was unnecessary and a matter wholly within the prosecutor's control. Moreover, the Court presumed prejudice from the delay. Here, the Federal Government had a good reason for not filing its indictment sooner and had absolutely no control over the filing of the state indictment. Moreover, the state and federal indictments were not identical.

In addition, the defendants have failed to establish that they suffered any prejudice. The only defendants to allege any prejudice on appeal are Mario and Estella Nevas and Ramirez. Specifically, they contend they were prejudiced by their time spent in state prison in that it interfered with their lives. Estella Navas also alleged that she was prejudiced by the loss of her child and "physical abuse." (Navas-Ramirez Br. Pt. I). Since these claims of prejudice were not properly alleged in

their papers below, they cannot be raised for the first time on appeal.* *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States* v. *Sisca*, 503 F.2d 1337, 1347-48 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). However, even if this claim had been properly raised below, it is insufficient to make out a claim of prejudice. Nor should this Court presume defendants were prejudiced. The Federal Government should not be charged with the consequences of the defendant's state incarceration. Even if it were to be so charged, defendants have failed to allege the kind of prejudice that supports a Sixth Amendment claim. Indeed, having been charged earlier by the state, the defendants were given the opportunity to begin preparing a defense and preserving evidence, overcoming the usual sources of possible prejudice in a pre-trial delay.

D. There Was No Prejudicial Pre-Indictment Delay

Defendants Estella and Mario Navas, Ramirez and Mejias have totally failed to show a pre-indictment delay

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* Judge Carter in his opinion below, however, states that Estella Navas "alleges that she has been prejudiced by virtue of increased anxiety incident to her eighteen month incarceration on Rikers Island, and the fact that she has a young child who has been shuttled through a series of foster homes while she has been in jail. She further alleges that her ability to recollect events has become dimmed." *United States* v. *Mejias*, *supra*, 417 F. Supp. at 595. These claims of prejudice, however, were not properly advanced in an affidavit by the defendants. They were based on representations of defense counsel. However, it was certainly insufficient for defense counsel simply to make representations of prejudice orally before the court. *United States* v. *Thomas*, 453 F.2d 141, 144 (9th Cir. 1971), *cert. denied sub nom. Lucas* v. *United States*, 405 U.S. 1069 (1972); *United States* v. *Crisona*, 271 F. Supp. 150, 154 (S.D.N.Y. 1967); see *United States* v. *Bumatay*, 480 F.2d 1012, 1013 (9th Cir. 1973); *United States* v. *Snelling*, 403 F.2d 627, 628 (4th Cir.), *cert. denied sub nom. Kilgore* v. *United States*, 394 U.S. 932 (1969); *United States* v. *King*, 49 F.R.D. 51, 53 (S.D.N.Y. 1970).

violative of their Due Process rights under the Fifth Amendment to the United States Constitution and Rule 48(b) of the Federal Rules of Criminal Procedure. Since the indictment in this case was clearly returned within the five year period provided for by the statute of limitations, the burden was on the defendants to establish that the delay was the product of prosecutorial misconduct and so impaired their capacity to prepare a defense as to amount to a denial of due process. *United States* v. *Marion, supra*, 404 U.S. 307; *United States* v. *Payden*, 536 F.2d 541, 544 (2d Cir. 1976); *United States* v. *Schwartz*, 535 F.2d 160, 164 (2d Cir. 1976); *United States* v. *Eucker*, 532 F.2d 249, 255 (2d Cir. 1976); *United States* v. *Frank*, 520 F.2d 1287, 1292 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States* v. *Capaldo*, 402 F.3d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969). As the Supreme Court stated in *Marion*:

> "... [T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused *substantial prejudice* to appellee's rights to a fair trial *and* that the delay was an *intentional device* to gain tactical advantage over the accused." 404 U.S. at 324 (emphasis supplied).

Here Judge Carter found that the defendants had "established neither actual prejudice not intentional delay ..." *United States* v. *Mejias, supra*, 417 F.Supp. at 596. His findings in this respect must stand unless "clearly erroneous." *United States* v. *Jackson*, 504 F.2d 337, 341 (8th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

First, the defendants below failed to make a showing that they had suffered any prejudice or that the government had attempted to gain a tactical advantage over them. Ramirez, who attempts to raise the point now, did not even file a motion on this issue in the District Court. Therefore, his appeal on this issue is foreclosed. *United States* v. *Rollins, supra*, 522 F.2d at 165; *United States* v. *Sisca, supra*, 503 F.2d at 134-48. Mario and Estella Navas and Mejias advanced their claims of prejudice through their lawyer in open court. (H. Tr. 972-974, 999-1001). It is beyond dispute that mere representations by counsel are insufficient to perfect a motion. *United States* v. *Thomas, supra*, 453 F.2d at 144; *United States* v. *Crisona, supra*, 271 F. Supp. at 154; see *United States* v. *Bumatay, supra*, 480 F.2d at 1013; *United States* v. *Snelling, supra*, 403 F.2d at 628; *United States* v. *King, supra*, 49 F.R.D. at 53.

Second, even if the defendants had properly advanced their claims of prejudice and tactical delay, Judge Carter's findings were amply supported by the record. The defendants claimed the following tactical advantages were secured by the Government through the delay: 1) the Government used the threat of the state prosecution with greater penalties to force the cooperation of the defendants; 2) the Government did not have to prepare the Mario and Estella Navas tapes for the Bravo trial; 3) the delay gave the Government more time to work on the trial for the defendants in this case; 4) the Government had two bites at the apple in the sense that if anything went wrong with the state prosecution the Federal Government could prosecute, and 5) it gave the opportunity to the Government to try the defendants in this case after it had the experience of the *Bravo* trial. (H. Tr. 973-974). *United States* v. *Mejias, supra*, 417 F. Supp. at 597.

Contrary to these bare allegations, the overwhelming evidence before Judge Carter was that the Federal Government had not had any plans to try these defendants until after Justice Coon upheld the suppression motion in the state court. The pre-indictment delay from that point on, amounting to less than five months, was necessary to complete the investigation of the charges in the indictment and to obtain the necessary proof in a form intelligible to a jury and certainly was not unreasonable. *United States* v. *Parrott*, 425 F.2d 972, 975 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970). A pre-indictment delay under these circumstances does not violate the Fifth Amendment Due Process Clause. *United States* v. *Ferrara*, *supra*, 458 F.2d at 875; *United States* v. *Stein*, 456 F.2d 844, 853 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972); *United States* v. *Parrott*, *supra*, 425 F.2d at 975; *United States* v. *Capaldo*, *supra*, 402 F.2d at 823; *United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).

Finally, the barrenness of this claim is further demonstrated by the defendants' failure to even allege on appeal that they suffered prejudice as a result of the pre-indictment delay. Even a deliberate and unnecessary pre-indictment delay is insufficient to establish a Fifth Amendment violation without proof of prejudice. *United States* v. *Feinberg*, *supra*, 383 F.2d at 67. None of the defendants has made any particularized claim that a key defense witness or valuable evidence was lost during the delay, that he was unable to reconstruct the events surrounding the alleged offense, or that personal recollections of the Government or defense witnesses were impaired. *Id.*; *United States* v. *Stein*, *supra*, 456 F.2d at 848-49; *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Capaldo*, *supra*, 402 F.2d at 823.

E. Judge Carter Properly Denied Defendants' Request For A Hearing

Finally, Judge Carter did not abuse his discretion in not granting the defendants a hearing on their speedy trial claims. Since there was no dispute over the dates on which the defendants were arrested and indicted, the only factual inquiry which could have been the subject of a hearing was the extent of federal involvement in the initial arrests. Before determining that a hearing was not necessary, however, Judge Carter gave the defendants more than ample opportunity to show what a hearing might establish. The defendants were permitted to and did submit affidavits and make oral offers of proof.* (Tr. 210, 963-1020). Afterwards, Judge Carter requested from the Government affidavits from Assistant District Attorney Herrmann and Assistant United States Attorney Littlefield concerning the genesis and operation of the joint federal-state investigation. Moreover, the defendants were permitted to respond to these affidavits, and on June 15, 1976, counsel for Mejias did so in an oral presentation to the Court. (Tr. 2274-71). Finally, in addition to permitting the defendants to show what a hearing might establish, during the hearing into the arrest and seizure at Mejias' 48th Street apartment, Judge Carter allowed defense counsel to cross-examine the Government's witnesses about the nature of the federal-state cooperation and the sovereignty which controlled the arrests. (Tr. 109-14, 119-22, 150-52, 215-16, 576-79, 585-90, 612-13). Defendants were also permitted, as part of

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* No personal affidavits sworn to by any of the defendants were offered to prove any facts.

their case in the hearing, to call Lieutenant Michael O'Shea of the New York City Police Department and to question him about the matters relating to the federal-state cooperation and the September 3rd arrests. (Tr. 809-18, 820-32)

Despite the fact that Judge Carter gave the defendants every conceivable opportunity to present facts different from those before him which would have raised a question about the arrests, requiring a hearing, none was presented. Judge Carter committed no error in denying a heading on the basis of defendants' speculation and bald allegations and in the absence of a clear showing of ". . . detailed and controverted issues of fact." *United States* v. *Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971), *cert. denied*, 409 U.S. 874 (1972).* See also *Michel* v. *United States*, 507 F.2d 461, 464 (2d Cir. 1974); *O'Neil* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1967).

Moreover, Judge Carter's finding was supported not only by the Government's affidavits but by the consistent testimony of the Government's witnesses at the pre-trial hearing. Such testimony conclusively established that the arrests of September 3rd, 1974 were all authorized by the state for state charges and that federal agents were present only to lend assistance to the state. Thus, Judge Carter properly found that the defendants were not deprived of their right to a speedy trial.

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* In the cases cited by the defendants Salazar and Mejias, *United States* v. *Pollak*, 474 F.2d 828, 830-1 (2d Cir. 1973); *United States* v. *Valot*, 473 F.2d 667, 668 (2d Cir. 1973) and *United States* v. *Scafo*, 470 F.2d 748, 750-1 (2d Cir. 1972), *cert. denied*, 414 U.S. 1012 (1973), the district judges had already determined that a hearing was justified and in each of these cases this Court remanded for further hearings. In this case the defendants had not presented the judge with any facts which required or even justified a hearing.

POINT II

The Motion To Suppress Evidence Seized At Apt. 1B, 445 West 48th Street Was Properly Denied

Defendants Padilla, Mejias and Salazar argue that the arrest of Mejias on September 3, 1974, at Apartment 1B, 445 West 48th Street in Manhattan was illegal and that Judge Carter erred as a matter of law in denying their motions to suppress evidence seized as a result of the arrest.* Specifically, these defendants argue that the arrest was illegal because it was made without a warrant and without the justification of exigent circumstances. (Padilla Br. 9, 23-25; Salazar-Mejias Br. 41). Their argument has no merit.

Following the filing of these motions to suppress, Judge Carter conducted a hearing at which the principal officers testified. Subsequently, he denied the motions in a carefully considered opinion. *United States* v. *Mejias*, 417 F. Supp. 598 (S.D.N.Y. 1976). Since the findings of fact made in that opinion can neither be improved nor concisely summarized, we quote that portion of the opinion *in haec verba*. After a preliminary discussion of facts

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* The following evidence was seized in the apartment either in plain view or pursuant to a search warrant delivered to the apartment later on the evening of the arrest: a) approximately $79,988 in cash found in seven different locations, b) approximately $31,160 in money orders and travelers checks, c) approximately 1 ounce of cocaine and over 12 plastic bags containing a residue of cocaine, d) five jars of lactose, e) plastic bags and a heat sealer, f) miscellaneous papers including accounts of narcotics transactions, and among other things, g) a safety deposit box key to a box in the name of Mejias from which was seized approximately $26,000 in cash and two passports, one American and one Colombian, the latter counterfeit, each containing a photograph of Mejias.

relevant only to the issue of probable cause, the court found:

> "Early in the day on September 3, 1974, Detective Manning was on surveillance at Mejias' residence, and he reported seeing [Maric] Navas and Mejias meeting in front of the building where Mejias lived; that Navas was carrying a red shopping bag with white handles; that both had entered the building and a short time later had come out of the building. When they came out Navas was no longer carrying the sh[illegible] bag.
>
> After reviewing the variou[illegible]s, summaries and synopses referred to and having received Manning's report of Mejias and Navas meeting, Palazotto, at 2:30 p.m. on September 3, himself took up surveillance outside Mejias' apartment. Shortly after assuming surveillance, Palazotto was authorized by his superiors to arrest Mejias if he saw fit.
>
> At about 4:45 p.m., while still on surveillance of Mejias' apartment, Palazotto saw a cab pull up in front of the building—445 West 48th Street—and a man and woman carrying boxes alighted from the cab and entered the building. It was raining and his vision was somewhat obstructed, but he recognized Mejias when he too stepped out of the cab and followed the others into the building. He decided then to arrest Mejias.
>
> He and three other officers entered the building. While one stayed in the lobby covering the front door of Mejias' apartment, Palazotto and the two other officers went up on the roof to determine whether there was a backdoor exit from Mejias' apartment. While there they were accosted by the building superintendent who expressed hostility and resentment concerning their interest

in Mejias after being advised of their identity. Palazotto and one of the two officers with him came downstairs to the lobby leaving one officer on the roof. When he reached the lobby, Palazotto advised his fellow officers that he was going to arrest Mejias.

One officer rang the outside bell to apartment 1B. Palazotto stood outside the door. He heard the buzzer releasing the lock on the lobby door and footsteps inside the apartment approaching the door. He knocked on the door, heard a voice speaking as if in greeting. The door was opened to the width of a chain secured on the inside, and he saw Mejias through the opening. Palazotto identified himself, showed Mejias his detective shield and told him that he was under arrest. Mejias retreated from the opening of the door back into the apartment beyond Palazotto's vision. When Palazotto could no longer see Mejias, he with the help of the other officer, pushed the door open by force.

When the door opened, Palazotto saw Mejias backing away, Valenzuela, Salazar and Padilla, the other defendants, in the act of rising from a bed on which he could see piles of money, a red shopping bag, a brown bag and pieces of cardboard. Salazar and Padilla had money in their hands. Palazotto grabbed Mejias, holding the latter in front of him as a shield and pointing his gun at the others, he told them to "freeze." He then told everyone to move over against the wall. Valenzuela appeared not to understand, and Palazotto approached the bed to get her to move. As he moved towards her and closer to the bed, he was able to read on the cardboard the name Mario, opposite of which was the figure $22,765 and the

name Mono with dollar figures beside that name. He made everybody stand up against the wall, patted them down for weapons, made a run-through of the apartment as previously indicated to make sure no one else was on the premises, advised his superiors of what he had done and was told to keep the place secure. He then advised Salazar and Padilla, who appeared to understand English, of their rights.

He entered the apartment at about 5:20 p.m.; a search warrant arrived at about 10:30 p.m. Prior to the arrival of the search warrant, no search of the premises was made except to look at what could be seen in open view. When the warrant arrived, a thorough search was made and quantities of cash, cocaine and paraphernalia connected with narcotics business were found."

417 F. Supp at 601-602.

Based on these facts, the defendants raise two principal claims.* First, they claim that the Government should have been barred by the doctrine of collateral estoppel from proving the legality of the search, since a New York Supreme Court Justice had ordered the same evidence suppressed in a state court proceeding. *People* v. *Salazar*, 373 N.Y.S. 2d 295, 83 Misc. 2d 922 (Sup. Ct. N. Y. Co. 1975). Even if the defendants had properly preserved this issue in the District Court,** it is absolutely without

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* Quite properly, none challenges the obvious fact that Agent Pallazotto had far more than probable cause to arrest Mejias, based on his extensive knowledge of the case.

** Judge Carter ruled on March 30, 1976, at a pre-trial conference in this case, that all motions had to be supported by a memorandum of law and that all motions were to be filed by Thursday, April 1, 1976. (3/30/76 Tr. at 22). Defendants' claim of collateral estoppel was never supported by such a memorandum.

[Footnote continued on following page]

merit. As this Court has very recently had occasion to emphasize, a prior adverse decision in state court based on the same facts can have "no collateral estoppel effect on the United States. . . ." *United States* v. *Magda*, Dkt. No. 76-1287, slip op. 1037 n. 2 (2d Cir., Dec. 22, 1976); see also *United States* v. *Panebianco*, Dkt. No. 76-1132, slip op. 119, 132 (2d Cir. Oct. 14, 1976); *United States* v. *Burke*, *supra*, 517 F.2d at 382. See generally *Elkins* v. *United States*, *supra*, 364 U.S. 223-224 ("The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another

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Rule 9(b) of the General Rules of the Southern District Rules requires the filing of a supporting memorandum along with any motion. "Failure to comply may be deemed sufficient cause for the denial of the motion . . ." *Id.* In the context of a complicated issue arising, if at all, at the eleventh hour in a large and complex case, the District Court's right to be properly informed was not a mere technicality. This is particularly true since no defendant tried to cure the deficiency of the original motions, although Judge Carter accepted post-suppression hearing memoranda, by submitting a memorandum of law on the issue of collateral estoppel, much less a memorandum which established how the principle applied to the *arrest* of Mejias, where the arrest was never considered by the state court.

The claims of Salazar and Mejias that they made timely motions (Salazar-Mejias Br. 11) to suppress on the grounds of collateral estoppel (Salazar-Mejias Br. 9, 12) are gross misstatements. They did not even make such motions, much less timely ones.

Mejias submitted a lengthy memorandum of law in support of his motion to suppress but never mentioned in it the issue of collateral estoppel. In his personal affidavit, dated May 14, 1976, and by his attorney during the hearing (H. Tr. 74-75), Mejias merely made allusions to the question of collateral estoppel, but only . . . "as dispositive of the issue of whether the *search* was legal under the law of New York . . . ." (Mejias aff., 5/14/76 at 3). Salazar submitted a post-suppression hearing memorandum of law, served on the Government on May 24, 1976, but, in support of the motion to suppress, only argued that there was no probable cause to arrest him.

may have colorably suppressed").* It follows that the prior decision of a state court judge concerning these facts, to which the United States was not a party, has absolutely no effect on these proceedings.**

Second, the defendants assert that the arresting agent should have procured an arrest warrant and that, for

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* The lengthy discussion in the Salazar-Mejias brief, pp. 25-40, concerning whether this was a "federal-state" search and whether the "dual sovereignty" rule should thus be abrogated is utterly irrelevant. Irrespective of the participation of the Federal Government in the investigation and arrest, it was surely not present at or represented in the state court proceedings as a "party." Thus, the decision of this Court in *United States* v. *Panebianco, supra,* is entirely controlling. While the search in question there was the product of a "joint federal-state agency," slip op. at 131, this Court noted that the Federal Government was not a "party" to a prior state court proceeding that led to the suppression of evidence and thus was not bound by it. *Id.* at 132.

** In their argument that the federal courts should be bound by prior determinations of state courts, certain defendants feel free to assert that "A careful comparison [of the state court testimony with that before Judge Carter] raises the ugly specter of perjury." (Salazar-Mejias Br. 18). In particular, they claim that since the arresting agents who testified at the state proceeding never metioned their encounter with the hostile building superintendent, this testimony in the federal hearing should be disbelieved. If Mejias and Salazar had made the careful comparison they now urge this Court to make, they may not have made their reckless and utterly baseless charge. Such a careful comparison would reveal that the question of such an encounter never arose in the state court proceeding; indeed, one of the two officers who testified about it, Special Agent James Forget, was not even questioned in the state proceeding. Further, the omission of this testimony in the state court raised at most a question of credibility, which the trier of fact clearly decided against the appellants. Finally, the event in question simply could not have been of overwhelming significance since Judge Carter did not even mention it in the discussion section of his opinion, *United States* v. *Mejias, supra,* 417 F. Supp. at 601, 602; which offers the most obvious reason for its omission at the earlier proceeding.

failure to do so, the arrest and subsequent search were illegal.* They recognize, as they must, that neither the Fourth Amendment nor any other constitutional provision requires an arresting officer to procure a warrant to make an arrest in a public place based on probable cause, even if he has ample time to do so.** *United States* v. *Watson*, 423 U.S. 411, 423 (1976). They argue, however, that since the arrest involved the entry into Meji ' apartment, a warrant was required.

This argument ignores both the facts and the statutory and the judicially-created support for the search. As the Supreme Court has noted, the power of state officers to effect an arrest for state offenses is governed by reference to state law. *Ker* v. *California*, 374 U.S. 23 (1963); *Miller* v. *United States*, 357 U.S. 301, 305 (1958); *United States* v. *Dire*, 332 U.S. 581, 589 (1948). Section 120.80(5) of the New York Criminal Procedure law explicitly provides that "If the officer is authorized to enter premises without giving notice of his authority and purpose, or *if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.*"*** (Emphasis added). Thus, the power of the arresting agents to effect this day time arrest was patent.

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* The defendants do not—and cannot—argue that the seizure of incriminating items once the agents were inside the apartment, effected largely on the strength of a search warrant, was illegal. See *United States* v. *Rodriguez*, 532 F.2d 834 (2d Cir. 1976). Thus, the issue on appeal is limited to the legality of the arrest.

** In any event, Judge Carter found that this was not a case where there was patently ample time to get a warrant. 417 F. Supp. at 602.

*** Section 120.80(4) requires that under general circumstances an arresting officer "must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof . . . ." No claim is made that such notice was not made. While section

[Footnote continued on following page]

It is similarly clear from the recent decision of the Supreme Court of the United States in *United States* v. *Santana*, 96 S. Ct. 2406 (June 23, 1976), that this arrest was fully constitutional. In that case, a narcotics agent, having probable cause to arrest the defendant Dominga Santana, went to her house and saw her in the doorway of her house.* When the defendant saw the arresting officers approaching her, she fled into the house and was arrested in the vestibule. The Court found that since the defendant was first sighted in a public place at the doorway of her home, the "hot pursuit" into and apprehension in her home was proper, even without a warrant. The reasoning and conclusion of that holding is directly controlling here. The arresting officers, fully complying with the statutory provisions quoted above, knocked at Mejias' door and, when they had announced who they were and when he presented himself at his doorway, they arrested him. Since he then fled into the apartment rather than allowing himself to be taken into custody, the entry into the apartment—and the entire

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120.80 applies, according to its headnote, to executions of a warrant of arrest, section 140.10(1)(a) clearly authorized the arresting officers to make the arrest without a warrant. Furthermore, section 140.15 provides that in order to effect a warrantless arrest (which may be made "at any hour of any day or night"), "a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

* The Supreme Court opinion variously refers to the exact spot where Santana was seen as the "doorway", 96 S. Ct. at 2408, and the "threshold." *Id.* at 2409. In a footnote, the locus is further delineated as "directly in the doorway—one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." *Id.* at 2408 n. 1.

subsequent chain of events leading to the discovery of the evidence—was entirely proper.*

POINT III

Judge Carter Properly Denied Rojas' Motion To Suppress Evidence Seized At Apartment 6A, 327 West 30th Street

Defendant Henry Cifuentes-Rojas claims that his conviction on Count Five should be reversed because Judge

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* No argument can be made that *Santana* does not control because Mejias was physically one step inside his apartment at the time he was placed under arrest. As this Court and the Supreme Court have had occasion to note, the protections afforded by the Fourth Amendment are not governed by distinctions based in property law but by reasonable expectations of privacy. *United States* v. *Galante*, Dkt. No. 76-1165, slip op. 959, 969 n. 12 (2d Cir., Dec. 14, 1976); *Mancusi* v. *DeForte*, 392 U.S. 364, 367, 368 (1968); *Katz* v. *United States*, 389 U.S. 347, 351-2 (1967); *Jones* v. *United States*, 362 U.S. 257, 266 (1960). Since Mejias voluntarily presented himself to the arresting officers at the door of his apartment, he clearly had no expectation of privacy that would bar his arrest at that point. Indeed, the analysis of the Supreme Court in *Santana* on this issue is directly applicable.

> "While it may not be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment, Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351, (1967). She was not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house. *Hester* v. *United States*, 265 U.S. 57, 59, (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*." 96 S. Ct. at 2409.

Carter erred in denying, without a hearing, his motion to suppress evidence seized on September 3, 1974, at Apartment 6A, 327 West 30th Street in Manhattan, and that his case should be remanded for such a hearing. (Rojas Br. 10-37). Specifically, Rojas argues that Judge Carter erred in finding that his motion was untimely and that Rojas had never properly alleged his standing to make such a motion. (Rojas Br. 12). Since this claim only challenges Rojas' conviction on Count Five, under the concurrent sentence doctrine, this Court need not consider the issue. However, even if it is reached, Judge Carter's ruling should be affirmed.*

A. The Court Need Not Consider Rojas' Argument

Rojas was sentenced to fifteen years' imprisonment on Count One, the conspiracy charge, of which 534 days were suspended, and to the identical sentence on Count Five, the sentences on each count to be served concurrently. Rojas has raised no claim of error with respect to his conviction on Count One of the indictment.** Since he has raised a question only with respect to a conviction carrying a sentence concurrent to the sentence on Count One, the Court need not determine the validity of his conviction on Count Five. *Lawn* v. *United States*, 355 U.S.

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* Evidence taken as a result of the search of Apartment 6A consisted of the following: 1) Three pairs of shoes containing traces of cocaine (GX 525-28); 2) aproximately one kilogram of cocaine (GX 529); approximately $10,000 in United States currency (GX 531-32) and 4) miscellaneous papers. (GX 533-55).

** Indeed, the principal issue Rojas raises with respect to Count Five—that he had "automatic standing—is totally inapplicable to Count One. As this Court has recently and explicitly held, while a charge of possession may create automatic standing, a change of conspiracy to possess cannot. *United States* v. *Galante, supra,* slip op. at 964-65.

339, 359 (1958); *United States* v. *Gaines*, 460 F.2d 176, 178-80 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States* v. *Costello*, 381 F.2d 698, 700 (2d Cir. 1967); *United States* v. *Orza*, 320 F.2d 574 (2d Cir. 1963). While this Court admittedly has power to review such a conviction, *Benton* v. *Maryland*, 395 U.S. 784, 789-92 (1969), in the exercise of its discretion, and particularly in the absence of any claim of collateral consequences attaching to the concurrent sentence, it should not do so. *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied sub nom. Ciuzio* v. *United States*, 416 U.S. 985 (1974); *United States* v. *Febre*, *supra*, 425 F.2d at 113.

B. Judge Carter Properly Denied Rojas' Motion As Untimely

As Judge Carter noted, and as the record shows, Rojas failed to perfect his motion within the time limits explicitly and properly established by the trial court. On March 30, 1976, Judge Carter ordered that all motions had to be filed by Thursday, April 1, 1976, and that each motion must be supported by a memorandum of law. (3/30/76 Tr. 22). Rojas filed papers dated April 1, 1976, but failed to support them with a memorandum of law. Therefore, on April 7, 1976, the Court denied Rojas' motion.* Judge Carter was justified in doing so since Rojas' motion was totally unsupported by a memorandum of law as specifically requested by the Court. Rule 9(b), General Rules (S.D.N.Y.). Rule 9(b) requires the filing

* Judge Carter permitted each defendant to join in the motions filed by other defendants. (3/30/76 Tr. 29). However, no other defendant made any motion with respect to the seizure at 327 West 30th Street.

of a supporting memorandum along with any motion, and provides "Failure to comply may be deemed sufficient cause for the denial of the motion. . . ." In the context of a complicated issue arising, if at all, late in a large and complex case, Judge Carter's right to be properly informed was not a mere technicality.*

Not only has Rojas failed to argue that it was error for Judge Carter to have denied his motion for failing to submit a memorandum of law (Rojas Br. 11-12), but he indirectly acknowledged the deficiency of his motion by submitting additional papers in the District Court. In addition, Rojas knew the court had scheduled the trial to begin in May (3/30/76 Tr. 12) and yet he failed to file any papers that even identified the search he alleged was illegal until May 18, 1976, fully forty-eight days after the time expired within which Judge Carter directed the defendants to make motions and nearly six weeks after his original motion was denied. Judge Carter properly denied this motion as untimely (H. Tr. 465). Rule 8(B), Rules for the Administration of the Civil and Criminal Calendars of the Southern District of New York.** Moreover, Rojas concurred with Judge Carter's findings. During the hearing of the motion to suppress evidence seized at Meijas' apartment, Rojas acknowledged the untimeliness of his May 18 motion and the deficiency of his

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* Judge Carter was also justified for this reason in denying Rojas' motion, made solely by an affirmation of his counsel, dated May 14, 1976. *Id.*

** Rule 8(B) provides that all motions ". . . shall be made returnable before the assigned Judge at such time as he directs. All criminal motions must be made within the time required by the Federal Rules of Criminal Procedure . . . or at such other time as the assigned judge directs."

earlier attempts at motions. However, he sought to justify his inaction by stating that it was not possible for him to file a motion earlier.*

Judge Carter's insistence on proper presentation of Rojas' motion was particularly appropriate since, in this case, all but one of the defendants were incarcerated and under the specific provisions of Title 18, United States Code, Section 3164(b) they were entitled to have their trial begin within 90 days of their arrest, that is

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* He argued that the necessary particulars were not provided until May 13, 1976, just six days earlier. (H. Tr. 465-66). His argument is contrary to fact. While a Bill of Particulars was not filed until on or about May 11, 1976, Rojas was specifically made aware that he was charged with possession of cocaine seized in Apartment 6A, 327 West 30th Street, not only by the language of Count Five, but also by that of Overt Acts 75 and 76 of the indictment, filed February 19, 1976. Additional notice was also given to Rojas' counsel, Stuart Shaw, Esq., by letter of the Government, dated April 5, 1976, which stated: "In addition, a seizure was made of narcotics and other materials in Apartment 6A, 327 West 30th Street, New York City, on 9/3/74. A copy of the search warrant application, search warrant and return is enclosed. The items seized are available for your inspection." Furthermore, Rojas' counsel responded to the Government's offer and on April 15, 1976, he examined eleven documentary exhibits seized from Apartment 6A, including a piece of paper on which appeared Rojas' alias "Botello," and two photographs of Rojas. Finally, on April 21, 1976, the Government further informed Rojas' counsel, by letter, that it might offer in evidence the material seized at Apartment 6A, 327 West 30th Street. Thus, beyond question, Rojas had all the information he needed to make a motion nearly a month before he made it, if not on February 20, 1976, nearly 85 days prior to the day he claims such information was first made available to him. Moreover, a copy of each of the Government's letters was contemporaneously provided to Judge Carter so the court was aware of the information at Mr. Shaw's disposal and could discount Mr. Shaw's protestations of inability to make a proper motion until so long after motions were to be filed. Thus, Rojas has utterly failed to show any good cause for his delay.

on May 20, 1976. Rojas filed his motion on the 88th day following the arrest of the defendants and on the second day of a suppression hearing at the conclusion of which the trial was to and did immediately commence. Thus, Judge Carter was under extremely demanding pressures to begin the trial as soon as possible.* For Judge Carter to have granted Rojas a hearing would have increased such pressures, possibly in further derogation of the rights of Rojas' co-defendants to a speedy trial. Since the hearing which Rojas requested unquestionably would have caused a considerable delay in the commencement of the trial, Judge Carter properly denied the motion.** *United States* v. *Bellamy*, 436 F.2d 542, 545 (2d Cir.), *cert. denied*, 402 U.S. 929 (1971); *United States* v. *Birrell*, 276 F. Supp. 798, 815-16 (S.D. N.Y. 1967); see generally *United States* v. *Mauro*, 507 F.2d 802-07 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

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* Indeed, predictably, defendants, including Rojas, moved to be released on bail only two days after Rojas served his motion and when Judge Carter denied their motions in a carefully considered opinion, they appealed unsuccessfully to this Court. *United States* v. *Padilla-Martinez*, 538 F.2d 921 (2d Cir. 1976).

** Indeed, the defendants—including Rojas himself—took the position that the pendency of pre-trial motions did not toll the running of the 90-day period prescribed by 18 U.S.C. § 3164(b). While this claim was rejected by Judge Carter in a carefully reasoned opinion, it was supported by the United States Court of Appeals for the Ninth Circuit in *United States* v. *Tirasso*, 532 F.2d 1298 (9th Cir. 1976), and the question was specifically left open by this Court on its review of Judge Carter's order. *United States* v. *Padilla-Martinez*, *supra*, 538 F.2d at 924. While the Government believes that the defendants' contentions in this regard were wrong, the plausible possibility that they were not lent particular urgency to the District Court's prompt disposition of pre-trial claims, and justified its insistence on timeliness.

C. Rojas' Motions Were Factually Insufficient

Even if this Court were to consider Rojas' claim and were to conclude that his motions were timely made, a review of the moving papers clearly demonstrates that they were totally deficient on their face, and that Judge Carter was fully justified in denying them on this ground as well.

First, despite the fact that the elements and importance of the search were long known to defense counsel, the motion papers stated no more than bald legal conclusions totally unsupported by sufficient allegations of facts. Since he "did not state sufficient facts which, if proven, would have required the granting of the relief requested," he was not entitled to a hearing. *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970);* see also *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960); *United States* v. *Tucker*, 262 F. Supp. 305, 309 (S.D.N.Y. 1966); Wright, *Federal Practice and Procedure* § 675 (1969).**

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* Indeed, the facts in *Culotta* were remarkably similar to those in this case. Culotta, like Rojas, relied principally upon the suppression of the same evidence in a separate trial in state court. Noting that "the state court determination was not binding on the federal judges," 413 F.2d at 1345, the Court went on to note that Culotta's moving papers "recited only the barest factual allegations" in support of his motions, which were "hardly sufficient to require that [the trial judge] hold an evidentiary hearing on the motion." *Id.*

** Rojas motion papers dated April 1, 1976, did not mention the premises as to which he was making his suppression motion but merely said he sought to suppress evidence suppressed by a state court in an unidentified proceeding seized from an unnamed premises. Furthermore, he also failed to mention the grounds on which he based his standing (Notice of Motion,

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Second, and more particularly, Rojas utterly failed to demonstrate that he had standing to contest the seizure of items from Apartment 6A at 327 West 30th Street, and his arguments to the contrary in this Court are totally meritless.

Initially, it should be noted that Rojas had—and still has—the burden of demonstrating standing. *United States* v. *Galante*, *supra*, slip op. at 967; *United States* v. *Masterson*, 383 F.2d 610, 613-14 (2d Cir. 1967),

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dated 4/1/76, ¶ 4) or the grounds upon which he sought to suppress the evidence, except to say ". . . the general grounds that statutory and constitutional requirements have not been complied with." (Stuart R. Shaw affidavit, dated 4/1/76, ¶ 4). Thus, it is entirely misleading for Rojas to state on appeal that on April 1, 1976, he ". . . duly made and filed a motion to suppress all evidence seized at apartment 6A, at 327 West 30th Street, New York, relying on the theory that the Government violated [Rojas'] rights under the Fourth Amendment. . . ." (Rojas Br. 10).

Rojas' affirmation of his counsel, dated May 14, 1976, had annexed to it the opinion of the state court judge who had granted his state motion to suppress but once again failed to allege the grounds upon which he sought to suppress the evidence. The state court opinion was, of course, of no assistance since, in a federal proceeding, the validity of a state search is to be tested by federal law. *United States* v. *Magda*, *supra*, slip op. at 1039 n.2; *United States* v. *Burke*, *supra*, 517 F.2d at 382; *United States* v. *Bedford*, 519 F.2d 650, 653-54 (3d Cir. 1975), *cert. denied*, — U.S. — (——).

Finally, in his notice of motion and accompanying brief, dated May 18, 1976, Rojas identified the premises where the search was made but argued only that his motion should be granted because his arrest was illegal. Specifically, he argued he was arrested without an arrest warrant in the absence of probable cause. He failed completely to support such broad and bold claims with any allegation of fact or to establish how an illegal arrest if any, on a street in Manhattan warranted suppressing evidence seized later in an apartment in which, moreover, he alleged no expectation of privacy.

cert. denied, 390 U.S. 954 (1968).* None of the papers filed in the District Court even came close to meeting this burden. The affidavit or affirmation of Rojas' attorney asserting standing was, of course, totally insufficient. Not only was it not based upon "personal information," and thus did not properly allege any relevant facts, *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967), but, as this Court has recently held, a mere allegation of standing in an attorney's affidavit is insufficient to meet a defendant's burden to establish standing. *United States* v. *Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305, 324 (2d Cir., Oct. 28, 1976).

Furthermore, the allegations made by Rojas himself were similarly insufficient.** As the Supreme Court

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* As the Supreme Court held, "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Jones* v. *United States*, *supra*, 362 U.S. at 361; see also *Brown* v. *United States*, 411 U.S. 223, 229 (1973). The Court has also noted that "the only, or at least the most natural, way in which [the defendant] could found standing to object to the admission of [certain evidence] was to testify that he was its owner." *Simmons* v. *United States*, 390 U.S. 377, 391 (1968).

** At page 2 of his affidavit, sworn to April 25, 1975, originally prepared in conjunction with his state indictment and submitted to Judge Carter as part of the May 18 motion, Rojas set forth the entirety of his so called factual allegations in the following language:

"I was exiting from my car in the vicinity of 327 West 30th Street at approximately 2:45 p.m. on the 3rd day of September, 1974, when I was seized by the arresting police officers and taken into Apartment 6B [a surveillance apartment] of premises 327 West 30 Street. I remained in this apartment with some unknown men until approximately 10:00 p.m. that evening, when the police officers took me across the hall into Apartment 6A [the apartment searched], where cocaine is alleged

[Footnote continued on following page]

has held,

> "it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

Brown v. *United States*, *supra*, 411 U.S. at 229; *United States* v. *Tortorello*, 533 F.2d 809, 813 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3300 (Oct. 19, 1976); *United States* v. *Galante*, *supra*, slip op. at 964. Nothing in Rojas' affidavit even purports to meet the first test set out in *Brown*—indeed, Rojas always went out of his way to claim that he had nothing to do with the materials seized. Similarly, he never claimed or showed that he had a "proprietary or possessory interest" in the apartment, *United States* v. *Brown*, *supra*, 411 U.S. at 229, or even that he had some "legitimate expectation of privacy" in it. *United States* v. *Galante*, *supra*, slip op. at 967-68 n. 11; see also *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).*

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to have been found. I was never shown a copy of the search warrant and upon information and belief, it is my belief that even at this late hour the Police officers had not obtained the search warrant they now claim they had in their possession at the time of the search."

* The fact that he used the apartment to store narcotics does not itself give him a sufficient interest in the place to found standing, as this Court has specifically held. *United States* v. *Galante*, *supra*, slip op. at 968 ("One who conceals contraband

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Finally, Rojas clearly cannot avail himself of the third exception noted in *Brown*, the so-called "automatic standing" doctrine of *Jones* v. *United States*, *supra*, 362 U.S. 257. The Supreme Court has held, and this Court has recently emphasized, that the "automatic" standing doctrine applies when a defendant is charged with "an offense that includes, as an essential element of the offense charged, possession of the seized evidence *at the time of the contested search and seizure*." *Brown* v. *United States*, *supra*, 411 U.S. at 229; *United States* v. *Tortorello*, *supra*, 533 F.2d at 813; *United States* v. *Galante*, *supra*, slip op. at 965. (emphasis added).* In this case, possession of the narcotics *at the time of the search* was not an element of the Government's case. Indeed, the Gov-

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or stolen goods on the premises of another does not thereby acquire an interest in those premises"); *United States* v. *Tortorello*, *supra*, 533 F.2d at 812-14; *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971).

* Indeed, Rojas' counsel seemed purposely to avoid relying on this ground, although quite clearly any statement made by him or his client to assert standing could not be used as an admission at trial. *Simmons* v. *United States*, *supra*, 390 U.S. at 389-90. Rather, he stated:

> ". . . I don't see how my client could be charged with possession if the Government is going to concede my client was outside.
>
> "How can I make a motion to suppress?
>
> * * * * *
>
> "Counsel and his client don't know what to do here. . . Where do we stand?
>
> "That is what my brief says this morning. If we have standing we move to suppress." (H. Tr. at 469-71).

In addition, Rojas' counsel admitted "I was loathe to make a motion to suppress for my client because of the fact that there may be a question as to standing." (Stuart Shaw affirmation, dated 5/18/76, ¶ 8). These statements are not only a virtual disavowal of the ground now asserted on appeal, but show ignorance of or disdain for the principle that the *defendant* had the burden of demonstrating standing.

ernment did not even attempt to make such a demonstration, relying instead on the principle of constructive possession, *see, e.g., United States* v. *Grant*, Dkt. No. 75-1430, slip op. 5847, 5854-55 (2d Cir., Oct. 10, 1976); *United States* v. *Casalinuovo*, 350 F.2d 207 (2d Cir. 1965). Thus, this is simply not a case where the denial of standing to Rojas permitted "the Government to have the advantage of contradictory positions as a basis for conviction," *Jones* v. *United States*, *supra*, 362 U.S. at 263, nor, in the light of the restrictions placed upon the uses by the Government of a defendant's affirmation of standing by *Simmons* v. *United States*, *supra*, was Rojas impermissibly "obliged to choose one horn of the dilemma." *Connolly* v. *Medalie*, 58 F.2d 629, 630 (2d Cir. 1932) (L. Hand, J.).* In short, Rojas' studied efforts to avoid establishing a basis for standing, as well as the total absence of any facts tending to show that he had such standing, all supported Judge Carter's ruling.**

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* As the Supreme Court put it in *Brown* v. *United States*, *supra*, 411 U.S. at 229, there is "no reason to afford such 'automatic' standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction."

** While Rojas expends a considerable portion of his brief, pp. 31-37, on the substantive merits of the legality of the search, we see no reason to do so in view of the dispositive nature of all three of the grounds discussed here. Without conceding the invalidity of the search, however, we do note that in the event this Court finds against the Government on all three grounds discussed in this point, a hearing before Judge Carter to establish the facts surrounding the search would be necessary.

POINT IV

The Evidence of Ramirez' Membership in the Conspiracy Was More Than Sufficient

Ramirez argues that the non-hearsay evidence was insufficient to show, by a preponderance of the evidence, that he, was "an actual participant in the [conspiracy] who had reached agreement with the other conspirators and acquired a stake in the venture . . ." and, alternatively, that Judge Carter erred in denying Ramirez' motion for judgment of acquittal under Rule 29, F.R. Crim. P. (Navas-Ramirez Br. 28-30). His argument has no merit.*

A. The Non-Hearsay Evidence Supported Judge Carter's Finding That Ramirez Was A Member of the Conspiracy

1. Facts

Mono was an importer of narcotics and Ramirez and Rojas were two of his wholesalers. As Ramirez concedes, (Navas-Ramirez Br. 29), Mono had contacts directly with his sources in Colombia. In the United States, Mono stored the narcotics he imported at various places. Among those places were Rojas' apartment and Ramirez' home.

On September 1, 1974, Mono, using defendant Navas' telephone, called Ramirez at the latter's home

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* Ramirez moved for judgment of acquittal pursuant to Rule 29, F.R. Crim. P., at the close of the Government's case (Tr. 3331), at the close of all testimony (Tr. 3589) and prior to sentencing. (Tr. 4139-40). As is evident in each case, Judge Carter denied the motions. (Tr. 3459, 3589, 4155).

and planned a meeting for September 3, 1974 at Apartment 6A, 327 West 30th Street, Manhattan. The purpose of their meeting was to permit Ramirez to deliver $10,000 of narcotics proceeds to Mono. In code and guarded language, Ramirez offered to deliver the proceeds already exchanged into money orders. With respect to a prior payment of narcotics proceeds which Ramirez made to Mono in cash, Ramirez offered the explanation that his associate, Palitraque, had volunteered to purchase the money orders but had simply failed to do so. Mono then instructed Ramirez about how to launder cash narcotics proceeds into money orders. He stated that First National City Bank was not the best bank to use since they sold money orders in maximum denominations of $500 whereas Chemical Bank sold in maximum denominations of $1000. Mono then told Ramirez to drive with his wife to Lexington Avenue, Fifth Avenue or Third Avenue, where there is a bank every four to six blocks. Mono directed Ramirez to purchase $3000 in money orders at each bank, leaving his wife in the car with the balance of the money. Mono then explained that following his suggested procedure, he has laundered $60,000 in one and one half hours. Mono also asked Ramirez whether Rojas had finished selling his allocation of narcotics and Ramirez answered he had not. However, Ramirez said he had needed more narcotics for his customers than had been given to him by Mono and he had taken some from Rojas allotment. Mono told Ramirez he could tell Rojas th.. Mono authorized what Ramirez had done. Mono then remarked that he would not allow Rojas to hoard the narcotics and to paralyze their operations. (Conv. 699, 9/1/74).

Between the time of the conversation above and approximately 11 A.M. on Tuesday, September 3, 1974, Ramirez and Mono again discussed their plans to meet each other and changed the location from Apartment 6A, 327 West 30th Street in Manhattan, to a location in

Queens. Before their meeting, however, Mono tried unsuccessfully to reach Ramirez at his home. (Conv. 755, 9/3/74).

Later the same day, Ramirez telephoned Mono at defendants Navas' apartment and planned a meeting at a little park near a gas station not far from the Navas' apartment. (Conv. 769, 9/3/74). Shortly thereafter, Ramirez again telephoned the Navas' apartment and told Estella Navas he was lost and would call later. (Conv. 775, 9/3/74). At the time of this call, Mono was seen pacing back and forth, for between five and ten minutes, not far from the Navas' apartment building, and was later seen returning to it. (Tr. 2052). Still later, Ramirez made another call to the Navas' apartment from a gas station and he and Mono made final arrangements to meet nearby. (Conv. 777, 9/3/74). At the very moment the wiretap intercepted the preceding call, a surveillance officer saw Ramirez, accompanied by Palitraque, speaking on a pay telephone located at a gas station. (Tr. 2053, 92-95). Only minutes later, Palitraque and Ramirez met Mono and began walking in the direction of the Navas' apartment when they were placed under arrest. (Tr. 2054-55). Lt. Michael O'Shea of the New York City Police Department removed from Ramirez' jacket ten blank $1000 money orders, wrapped in a white handkerchief embroidered with the letter "H" and a card which listed the telephone number of Rojas. (Tr. 2056; GX 500, 501, 503). The money orders had been purchased at different banks (GX 500) as Mono had suggested (Conv. 699, 9/1/74). After his arrest, Ramirez did not identify himself by his true name, Hugo Ramirez, but as Juan Ramirez. (Tr. 2070).

In addition to Ramirez' own conversations and acts, the evidence included an 8mm home movie and a telephone book seized from the apartment of co-conspirators Carl . and Libardo Gill on September 30, 1974. Those

items of evidence, which contained, respectively, a picture of Ramirez and a listing of his name and phone number, demonstrated that Ramirez was associated with the Gills. (Tr. 2059; GX 456, 474).

2. Discussion

The direct and circumstantial non-hearsay evidence, *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Ruiz*, 477 F.2d 918, 920 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States* v. *Pacelli*, 470 F.2d 67, 69-70 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973), viewed in the light most favorable to the Government; *United States* v. *Head*, Dkt. No. 76-1249, slip op. 647, 654 (2d Cir., Nov. 29, 1976); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), was more than sufficient to establish by a fair preponderance of the evidence that Ramirez was a member of the conspiracy. *United States* v. *Glazer*, 532 F.2d 224, 228 (2d Cir. 1976); *United States* v. *Calabro*, 449 F.2d 885, 889 (2l Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*. 397 U.S. 1028 (1970); *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942). Moreover, in this case, the existence of the conspiracy to distribute cocaine was established, *United States* v. *Head*, *supra*, slip op. at 652; *United States* v. *Araujo*, 539 F.2d 287, 289 (2d Cir. 1976) and the Government was required merely to show "a likelihood of an illicit association . . ." between Ramirez and his co-conspirators. *United States* v. *Calabro*, *supra*, 449 F.2d at 891; *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). Here the proof went much further.

Ramirez concedes that Mono was a narcotics dealer and that he used money orders to forward narcotics

proceeds to the persons who headed the organization in Colombia, thereby conceding the existence of the conspiracy and Mono's position in it close to its Colombian leaders. However, he argues that Ramirez' mere possession of money orders and his delivery of them to Mono was insufficient to establish, by a preponderance of the evidence, that Ramirez was a knowing participant in the conspiracy. (Navas-Ramirez Br. 29). While Ramirez studiously ignores the other evidence which Judge Carter had before him on the question, it is clear that even if Ramirez' conduct was susceptible of an inference other than his participation in the conspiracy, an inference of complicity was justified when Ramirez' acts were viewed in the context of all the surrounding circumstances. *United States* v. *Calabro*, *supra*, 449 F.2d at 890; *United States* v. *Geaney*, *supra*, 417 F.2d at 1121. Thus, while Ramirez' possession of the telephone number to defendant Rojas' 30th Street apartment as well as to that of the defendants Navas may not be sufficient by itself to meet the test, *United States* v. *Bentvena*, 319 F.2d 916, 949 (2d Cir.), *cert. denied sub nom. Mirra* v. *United States*, 375 U.S. 940 (1963), nevertheless, it is some evidence that Ramirez was a member of the conspiracy. *United States* v. *Manfredi*, *supra*, 488 F.2d at 597. When considered in light of Ramirez' discussion of his initial plan to meet Mono at Rojas' apartment on September 3, 1974, at 1:00 P.M. and to pay Mono $10,000 which constituted proceeds of narcotics sales, the conclusion is inescapable that Ramirez was a member of the conspiracy. (Conv. 699, 9/1/74). In this same conversation, Ramirez manifested his knowledge that Rojas was another wholesale distributor for Mono. Thus, Ramirez demonstrated in this conversation not only his own role in the conspiracy, but an awareness of its wider scope.

Indeed, on the basis of merely his first recorded conversation in evidence (Conv. 699, 9/1/74), Judge Carter

could have found, by a preponderance of the evidence, that Ramirez was a member of the conspiracy. That conversation established that Ramirez had met with and paid Mono previously and that Ramirez knew Mono preferred to be paid in money orders. Moreover, it was reasonable for Judge Carter to infer that such past payments as well as the one contemplated were for narcotics, since Mono was shown to be involved only in selling narcotics and the conversation was conducted in guarded and coded language. In addition, the conversation established not only that Ramirez knew Rojas was also a distributor for Mono but also that he and Rojas worked together closely selling narcotics for Mono. The conversation also helped to establish the scale of Ramirez' operation by showing that Ramirez not only sold narcotics valued at $10,000 but also that he had an associate, Palitraque, who helped him. Finally, among other things, the conversation established that Mono, Ramirez and Rojas used Apartment 6A, 327 West 30th Street for conducting their narcotics business. When the physical activities of Ramirez on September 3, 1974, when he and Palitraque met Mono near the Navas' apartment, are coupled with the conversation discussed above, they establish by more than a fair preponderance of the evidence that Ramirez, Mono, Rojas, and Palitraque were co-conspirators. *Cf. United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

The Government offered even more proof that Ramirez was a member of the conspiracy. The money orders which Ramirez was delivering to Mono on September 3, 1974 were concededly a means of committing the crime, (Navas-Ramirez Br. 29), and as such could properly be considered as some evidence that Ramirez was a member of the conspiracy, *cf. United States* v. *Geaney*, *supra*, 417 F.2d at 1120. Moreover, Ramirez' purchase of these money orders and his attempted delivery of them to Mono,

a person concededly involved in distributing large amounts of cocaine, is, by itself, substantial evidence linking Ramirez to this conspiracy. *United States* v. *Tramunti*, 513 F.2d 1087, 1108-1109 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Mallah*, 503 F.2d 971, 975 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Taking all of the non-hearsay evidence together, Ramirez' participation in the conspiracy was amply demonstrated.

B. The Evidence More Than Justified Submitting the Question of Ramirez' Guilt to the Jury

Judge Carter committed no error in denying Ramirez' motions for a judgment of acquittal since, upon the evidence taken as a whole, "a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt." *United States* v. *Wiley*, 599 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Glasser*, 443 F.2d 994, (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

No defendant questions the existence of a single conspiracy and Ramirez goes so far as to expressly concede Mono was a narcotic's dealer with sources in Colombia. (Navas-Ramirez Br. 29). Once the fact of the existence of the conspiracy itself was established, only slight additional evidence was necessary to demonstrate Ramirez' participation in the conspiracy. *United States* v. *Marrapese*, *supra*, 486 F.2d at 921. Thus, Ramirez' claim is frivolous.

This is not a case like those cited by Ramirez, *United States* v. *Santone*, 290 F.2d 51, 58, 78-9 (2d Cir. 1960), *cert. denied*, 365 U.S. 834 (1961) (Tolentino and Nardini); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied sub nom. Barcellona* v. *United States*, 362 U.S. 982 (1960) (Rodriguez) or *United States* v.

Reina, 242 F.2d 302, 306 (2d Cir.), *cert. denied, sub nom. Moccio* v. *United States*, 354 U.S. 913 (1957) (Valachi), where the defendant was apparently convicted on evidence of mere presence alone and the evidence was insufficient to support the inference that defendants knew or accepted the conspiratorial aims or that their participation went beyond the single transaction.* *Cf. United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). Indeed, this case was far stronger against Ramirez than many where the Court has, nevertheless, found the evidence was sufficient to support a guilty verdict. *United States* v. *MacDougal-Pena*, Dkt. No. 76-1320, slip op. 675, 678-680 (2d Cir. Dec. 1, 1976); *United States* v. *Tramunti*, *supra*, 513 F.2d at 1110-11; *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States* v. *D'Amato*, *supra*, 493 F.2d at 364-65; *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States* v. *Marrapese*, *supra*, 486 F.2d 918.

Here, the jury was reasonably entitled to infer from Ramirez' and Mono's first telephone conversation in which they referred to the delivery to Mono of $10,000 and to previous payments Ramirez made to Mono, that Ramirez and Mono were discussing payments for multiple sales of narcotics. (Conv. 699, 9/1/74). The inference was supported by the evidence that dozens of kilograms of narcotics were imported and distributed by the organization of which they were members and that payment for them was often made by blank money orders. More-

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* These cases were cited by Ramirez in that section of his brief devoted to the question of whether there was sufficient non-hearsay evidence to warrant admission against him of his co-conspirators' declarations. However, none of the opinions, as cited, address themselves to that point. Each case, to the contrary, is directed at whether or not there was sufficient evidence to warrant a reasonable jury in finding the defendant guilty beyond a reasonable doubt.

over, the jury could also infer from Ramirez' informing Mono that he, Ramirez, had to take some narcotics allocated to Rojas that both understood the narcotics involved were bought for distribution at retail. *United States* v. *Stromberg*, *supra*, 268 F.2d at 268.

In addition, on the basis of their first conversation and the surveillance of Ramirez on September 3, 1974, the jury could find that Ramirez and Mono had at least two meetings, the first when Ramirez gave Mono cash instead of money orders and the second at the time of their arrest on September 3, 1974. They could also infer that Mono and Ramirez had another conversation between that of September 1st and those of September 3rd in which they changed the planned location of their meeting from Manhattan to Queens. This series of meetings and conversations alone distinguishes this case from those cited by Ramirez.

The conclusion that Ramirez was a member of the conspiracy is almost irresistable. Whenever Mono and Ramirez conversed by telephone they used very guarded language and, occasionally, a pre-arranged code, evidence on the basis of which the jury could infer that Ramirez was a knowing participant in the conspiracy. *United States* v. *Sisca*, *supra*, 503 F.2d at 1343; *United States* v. *Cirillo*, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

In addition, the jury could infer that, following his arrest, Ramirez gave a false name when he identified himself as Juan Ramirez rather than Hugo Ramirez, further evidence of his knowing participation in the conspirac *Cf. Marcoux* v. *United States*, 405 F.2d 719, 721 (9th 1968); *Jordan* v. *United States*, 324 F.2d 178 (5th Cir. 1963).

Thus, the direct and circumstantial evidence was more than sufficient to permit the jury to draw the reasonable inference that Ramirez "knew about the enterprise and intended to participate in it or make it succeed." *United States* v. *Cirillo*, *supra*, 499 F.2d at 883; *cf. United States* v. *Joyce*, Dkt. No. 76-1182, slip op. 1, 5 n.10 (2d Cir., Sept. 20, 1976).

POINT V

Judge Carter Properly Admitted Into Evidence the Documents Seized From Padilla

Padilla argues that his conviction should be reversed because certain documents seized from him after his arrest on Federal charges were hearsay and were, therefore, improperly admitted into evidence. (Padilla Br. 30-35). Specifically, he argues that the proper foundation was not laid for the admission of the exhibits since they were admitted for their truth and that, in any event, Judge Carter failed to give the jury proper limiting instructions. His argument has no substance.

Padilla's claim of error is limited to the admission of three documents, a hotel receipt from the Skyline Motor Inn for Room 327, dated September 2, 1974, (GX 104A); an undated receipt from the L & L Luggage Co. in Brooklyn, New York to F. Padilla for "1 American Tourst (sic) Tote For Men," costing $28 less a $10 deposit (GX 104F); and a business card of Oscar Perez from the Las Americas travel agency, with handwriting and typing on the reverse side showing Padilla's name and a flight schedule for April 27, 1974, to Curacao and Barranquilla, Colombia, (GX 104B). These items were among seven documents seized from Padilla on February 19, 1976, at the time of his arrest on Federal charges. Each of the

documents was properly authenticated by a witness who had personal knowledge that they were in Padilla's possession at the time of his federal arrest. (Tr. 3288), F.R. Evid. 901(b)(1).

These documents were not inadmissible hearsay. First, the documents were not hearsay because they were not "offered in evidence to prove the truth of the matter asserted." F.R. Evid. 801(c). Instead, the writings were admissible "*circumstantially*, as giving rise to direct inferences, but not as assertions to prove the matter asserted" in the documents themselves. *United States* v. *Canieso*, 470 F.2d 1224, 1232 (2d Cir. 1972), quoting 6 Wigmore, Evidence § 1766 at 180 (3d ed. 1940). See also 6 Wigmore, Evidence § 1766 at 250 (Chadbourn Rev. Ed. 1976). With respect to the business card, the matter asserted on the reverse of the card was a possible itinerary for Padilla to travel to Colombia on April 27, 1974. The Government used this document circumstantially in conjunction with other evidence to prove that Padilla did in fact go to Colombia. Similarly, the hotel record asserted that a bill for $33.40 had been paid at the Skyline Motor Inn for Room 327 on September 2nd. The Government did not offer this document to prove the matters asserted on the receipt but as circumstantial proof to corroborate the fact that Padilla had been seen entering Room 327 at the Skyline Motor Inn at about that same period of time. Also, the luggage receipt was not offered to prove that Padilla bought a briefcase for $28 but was offered as circumstantial proof to corroborate the testimony that Padilla had been the one who had carried a similar briefcase into Room 327 of the Skyline Motor Inn between August 31st and September 1st, 1974, (Tr. 2128-31) and who owned the American Tourister attache case, containing $31,535, which was seized in Room 327 of the Skyline Motor Inn on September 3, 1974. (Tr. 2994-99; GX 560, 561).

Similarly, all three documents were admissible as non-hearsay evidence which merely showed Padilla's relationship to his co-conspirators Salazar and Oscar Perez. This Court has made it abundantly clear that documents which show an association or relationship between co-conspirators or others involved in the crime are admissible for that purpose. *United States* v. *Head*, *supra*, slip op. at 653; *United States* v. *Panebianco*, *supra*, slip op. at 133-34; *United States* v. *Ruiz*, *supra*, 477 F.2d at 919; *United States* v. *Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Garelle*, 438 F.2d 366, 369 (2d Cir.), *cert. dismissed*, 401 U.S. 967 (1971). The business card of Oscar Perez clearly shows a relationship between Padilla and Oscar Perez, and the reverse side of the card further corroborates the extent of their association since Perez had testified that Padilla was in Colombia after April 27, 1974. (Tr. 1674). The receipt for the briefcase and the hotel receipt show a direct relationship of Padilla with Salazar. Room 327 was occupied by Salazar and a guest (GX 271(A), 279, 101-D) and Padilla's possession of a receipt for payment for Room 327 for the period it was so occupied not only tended to corroborate other evidence of his relationship with Salazar, such as his entering Room 327 carrying a briefcase on either August 31 or September 1, 1974 and his counting money with Salazar at the time of their arrest on September 3, 1974, but also tended to show Padilla was the unnamed guest and, therefore, the one who shared Room 327 with Salazar. (Tr. 2128-31). On September 3, 1974, an American Tourister attache case, containing $30,585 was seized in Room 327. Padilla's possession of an invoice for an American Tourister Tote costing $28 tended to corroborate not only the testimony that he had been the one seen entering Room 327 with a briefcase on August 31 or September 1, 1974, but also that he was the owner of the briefcase seized in Room 327 on September 3, 1974. (GX 560, 561). Moreover, the fact that Padilla resided in Room 327 was further confirmed

by his presence at a meeting in the Skyline Motor Inn on August 30, 1974, with Mario Navas, Mejias and Mono, each of whom at that time resided elsewhere. (Tr. 2799-2805).

Even had the documents been offered for the truth of the writings which they contained, they would still not be hearsay since they constituted "statement[s] of which [Padilla] . . . manifested his adoption or belief in . . . [their] truth." F.R. Evid. 801(d)(2)(B); *United States* v. *Bennett*, 409 F.2d 888, 898 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969). In *Bennett*, this Court stated that a letter to the defendant requesting assistance, found in his girlfriend's handbag, not even in his personal possession, could have been "admissible against him on the ground, among others, that his performance of the acts requested was an admission of the letter's contents." 409 F.2d at 898. The Court also stated that this admission was further supported by the facts that the letter was retained for a month and was found in the girlfriend's handbag.

Applying the rationale of *Bennett* to this case, Padilla, by the performance of specific acts, clearly adopted as admissions the contents of each of the three documents. The business card (GX 104B) containing an itinerary for Padilla, beginning April 27, 1974, was obviously adopted by Padilla as an admission since there was testimony by Oscar Perez, and supporting documents, that indicated that Padilla went to Colombia around that period of time. (Tr. 1671-74); (GX 103F, 404). The hotel receipt for Room 327 at the Skyline Motor Inn was likewise adopted by Padilla as an admission since there was surveillance testimony that Padilla was in that same room at the Skyline Motor Inn on one day between August 31 and September 1, 1974 and had a meeting there with three coconspirators who lived elsewhere. (Tr. 2128-31; 2799-2805; GX 108A). Finally, the receipt for the "American Tourst (sic) Tote for Men" was also adopted by Padilla as an admission since there was independent proof at

trial that on the same day Padilla entered Room 327 of the Skyline Motor Inn, where, as indicated above, an American Tourister briefcase was seized containing over $30,000 he carried a briefcase identical to that seized in his motel room. (Tr. 2131).

Finally, Padilla argues that he was prejudiced by the admission of these documents into evidence because they were critical to the Government's case against him. (Padilla Br. 32-34). This argument has absolutely no merit. As indicated, these documents were merely cumulative and corroborative of other evidence. Moreover, Padilla's participation in the activities at Mejias' apartment on September 3, 1974, and the narcotics accounts in his possession at that time, constituted overwhelming evidence against him. In these circumstances, had the admission of these documents been error—a point which we vigorously contest—it would have been harmless and reversal of defendant's conviction would be unwarranted.* *United States* v. *Scafo*, *supra*, 470 F.2d at 750.

POINT VI

There Was No Prosecutorial Misconduct

Mejias and Salazar contend that their convictions must be reversed because prosecutorial misconduct denied them their right to a fair trial. (Mejias and Salazar Br. 62-73). Their principal argument is that the prosecutor im-

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* Defendant Padilla also argues that Judge Carter's statement to the Government during summation that the documents were admitted into evidence for the limited purpose "of showing that they were in his [Padilla's possession] at the time of his arrest" was insufficient to instruct the jury of the purpose of this evidence. (Padilla Br. 34). Defense counsel, however, requested no limiting instruction. Indeed, when the court interrupted the Government's summation relating to these documents, the interruption was not caused by the objection of defense counsel but by the Judge acting *sua sponte*.

properly caused prejudicial publicity. They supplement this allegation with miscellaneous claims of misconduct by the prosecutor including (1) his attempt to offer into evidence photographs of rifles; (2) his attempt to read from an exhibit in evidence; (3) his "improper editorial comments in the course of making objections," and; (4) his attempt to present arguments at sentencing. All of these claims are totally frivolous.

A. Publicity

The claim of improper publicity stems from news coverage of the related case, *United States* v. *Alberto Bravo*. Michael Q. Carey, the Assistant United States Attorney in charge of this case and *Bravo*, was interviewed on March 5 and 16, 1976, by a television news team of the National Broadcasting Corporation ("NBC"). These interviews, which occurred approximately two weeks after the defendants were sentenced in the *Bravo* trial, concerned themselves solely with the proof in that trial relating to cocaine trafficking from Colombia, South America to the United States. In conjunction with the interview, NBC also photographed several exhibits which had been part of the evidence in the *Bravo* trial.

On June 2, 1976, three days prior to the airing of a television program which was to be based, in part, on the *Bravo* trial, the Government informed the District Court that the broadcast would be taking place. (Tr. 975-81). The judge specifically instructed the jurors not to watch the show and not to allow any members of their families, friends or associates to watch the show. (Tr. 1337). At the request of the Government, the judge left open the possibility that the jury might be questioned as to whether they actually viewed the show. (Tr. 1337).

On June 5, 1976, at 11:30 p.m., NBC did televise a fifteen minute program concerning cocaine smuggling from Colombia to the United States. The interview of Mr. Carey was not televised or quoted as part of this broadcast despite defense claims to the contrary. No mention was made during the entire broadcast of this particular case or of any of the defendants. Two items which had been part of the evidence of the *Bravo* case, and which were also admitted into evidence in this trial, were displayed during the broadcast. These items were a photograph of a co-conspirator and hollowed out coat hangers. (GX 62, 249).

On June 7, 1976, the first court day following the program, Judge Carter told the jury that "even though he instructed them not to see the program, he did see it and it was "so innocuous" that it "couldn't possibly have influenced . . ." them. (Tr. 1348). The court did not conduct a voir dire to determine whether any of the jurors had seen the show and none of the defense lawyers requested that a voir dire be conducted.

Mejias and Salazar attempt to portray the publicity at issue here as an improper attempt by the prosecution to publicize matters related to their criminal trial while it was in progress. In fact, the record was clear that the publicity related to the earlier case, *United States* v. *Bravo*, and involved matters of public record that could not properly be withheld from the news media.* To the

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* Rule 8 of the Criminal Rules of the Southern District Rules which track the American Bar Association's Standards relating to Fair Trial and Free Press permit a lawyer during trial to ". . . quote from or refer without comment to public records of the court in the case." The two items of evidence shown on the television broadcast were part of the public record of the *Bravo* trial. Had the prosecution refused the media the

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extent that the media's interest in matters related to the *Bravo* case was apt to cause publicity that might prejudice the jury in this case, the Government sought to avert the problem by calling the matter to the attention of the District Court, which was then able to insulate the jury from the publicity.

Although the defendants argued to the District Court that the publicity was prejudicial, they were notably uninterested in learning whether the jury violated the court's clear directive to avoid all contact with the program. Likewise, the defendants made no attempt to preserve a transcript of the program for this Court's review on appeal, preferring instead to leave themselves free to mischaracterize the broadcast as they may choose. On this record, or indeed in the absence of any record, the defendants must accept Judge Carter's characterization of the program as "so innocuous" that it could not have caused prejudice, an observation which they did not seek to refute in the District Court.

A jury verdict will be reversed for improper publicity only when there is a showing by the defendants of prejudice. *United States* v. *Pfingst*, 477 F.2d 177, 186 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States* v. *Armocida*, 515 F.2d 29, 49 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States* v. *D'Andrea*,

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right to examine exhibits in evidence at a prior trial, it would have been curtailing the public's "right to be informed as to what occurs in its courts." *Estes* v. *Texas*, 381 U.S. 532, 541 (1965). See also *Nebraska Press Ass'n.* v. *Stuart*, Dkt. 44 L.W. 5149 (U.S., June 30, 1976).

There was likewise no impropriety in the prosecutor's interview on the general subject of cocaine importation from Colombia to the United States, a discussion which did not relate specifically to this case. However, in any event, no part of that interview was ever broadcast and accordingly there can be no claim of prejudice stemming from it.

495 F.2d 1170, 1172 (3d Cir. 1974). In the instant case, the defendants have totally failed to show that the television broadcast on June 5, 1976 caused any prejudice whatsoever.

B. Other Claims of Misconduct

Mejias and Salazar also argue that the prosecutor engaged in misconduct when he offered certain photographs into evidence. On June 4, 1976, the Government told Judge Carter, outside the presence of the jury, that it intended to offer into evidence various firearms seized at Apartment 4-G at 59-21 Calloway Street in Queens, New York. (Tr. 1188). In response to statements by the Government and defense counsel, Judge Carter stated that he was ". . . reasonably sure that . . . [he was] not going to allow . . ." the firearms into evidence (Tr. 1191), but stated that he might change his mind depending on what other evidence came out during the course of the trial. (Tr. 1192).

That same day New York City Police Officer Thomas Jennings testified to the seizure of evidence at the Calloway Street apartment without being asked to identify the firearms which were seized. In addition, Judge Carter instructed the witness not to mention the firearms. (Tr. 1207). After Officer Jennings described what was seized, he was shown a number of photographs of the apartment taken at the time of the seizure. He described them simply as photographs of the evidence seized at the apartment. He never mentioned the firearms. The photographs were taken of an unfurnished room and its contents as they were discovered, including a marijuana press with a 30 ton capacity, a trunk filled with plastic sandwich bags filled with marijuana, bales of marijuana, a trucker's helper and a second trunk in which were two scales, three bottles of lactose, two boxes of plastic sandwich bags, a pistol and a rifle. The Government offered

all the photographs as a series. (GX 87-87C). After Jennings identified the photographs and before they were shown to the jury, they were shown to defense counsel to allow them the opportunity to voice their objections. Defense counsel took specific objection to the only photograph which, among other things, also showed the pistol and rifle. (GX 87C; Tr. 1222-2).

The defendants characterize the offer of the photograph as a "disingenuous tactic." (Mejias and Salazar Br. 67). There was nothing tactical nor disengenuous about it since every part of the Government's offer was made known to defendants in such a way that no part of the information they found objectionable could ever have come to the jury's attention over their successful objection. Moreover, the trial court had left open the possibility that the firearms would be admitted into evidence if other evidence were developed which justified their admission. In this case, the series of photographs showed not only the firearms but the layout of the apartment, the contraband and the equipment as it was found and used. Furthermore, the firearms were not prejudicially highlighted in the photographs. Such, possible overemphasis may have been why Judge Carter excluded the firearms as individual exhibits. Indeed, in the photographs, the firearms were shown where the defendants had left them. The offer of evidence in a way which allowed counsel a full opportunity to examine it and to object to it prior to its receipt in evidence overcomes the suggestion that the Government was trying improperly to place inadmissible evidence before the jury. Although the defense objection prevailed, the prosecutor could not have predicted this result. He was entirely justified in offering the evidence and hoping to win on the issue.*

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* There can be no claim that the firearms were, as a matter of law, inadmissible. This Court has recognized that "[e]xperi-

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Defendant's claim that prosecutorial misconduct occurred when the Assistant United States Attorney attempted to read from exhibits in evidence is equally absurd. It is a matter well within the discretion of the trial judge to determine whether an entire document in evidence must be read at one time or whether the proponent of the document may only read that portion which relates to his case. 8 Wigmore, *Evidence*, § 2102. (McNaughton Rev. Ed. 1961). Thus, Judge Carter's rulings which prohibited the Government in certain cases from reading parts of Government exhibits in evidence were more favorable to defendants than the law required. Moreover, defendants have not and cannot allege any prejudice resulting from the manner in which the documents in evidence were presented to the jury.

Similarly, defendants have failed to show any prejudice resulting from the Assistant United States Attorney's allegedly "improper editorial comments in the trial." Judge Carter admonished both the Government and defense counsel about making extended remarks while presenting objections.* Certainly, none of the four

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ence on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." *United States* v. *Weiner*, 534 F.2d 15, 18 (2d Cir. 1976). Therefore, the Government could fairly expect that the firearms or photographs of them would be received into evidence. Moreover, evidence of firearms had already been admitted during the trial without objection. (Tr. 574, 991).

* With respect to the admonishment cited by the defendants (Mejias and Salazar Br. 68), they conveniently leave out Judge Carter's statement at the end of the quote that he doesn't ". . . want any further problems about it [meaning speaking objections] from you [Mr. Carey] or Mr. Chiampa [Mejias' lawyer] or anyone else." (Tr. 2542). Clearly, these remarks about speaking objections were directed at defense counsel as well as the Government.

brief remarks made by the Government over the course of a six week trial and cited by the defendant can be said to be prejudicial, particularly in light of the Court's actions reprimanding the Government in front of the jury. *United States* v. *Pfingst*, *supra*, 477 F.2d at 188; *United States* v. *Sawyer*, 469 F.2d 450, 453 (2d Cir. 1972).*

Finally, there is absolutely nothing in Government counsel's remarks at sentencing which support a reversal. The law is abundantly clear that "a prosecutor has a duty to reveal matters to the court which are relevant to proper sentence whether or not favorable to the defendant. . . ." *United States* v. *Pfingst*, *supra*, 477 F.2d at 191. Nevertheless, the District Court curtailed the Government's presentation of specific comments upon the sentencings in this case. (Tr. 4174-77). Judge Carter's disinclination to hear extensive comments from the Government at the sentencing does not demonstrate anything improper about the prosecutor's attempts to be heard at that time.

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* The four remarks cited by the defendants are those at Tr. 2517, 2536, 2541, and 3107. There is also no substance to defendant's claim that the Assistant United States Attorney responded to an objection ". . . in a manner as if to suggest his own integrity were on trial." (Mejias and Salazar Br. 68-69). The Assistant United States Attorney simply asked the witness whether he had already testified about the meaning of a word in a particular exhibit. (GX 103C). Defense counsel objected on the ground that the question was leading and Judge Carter sustained the objection. The question was clearly not leading and the Assistant United States Attorney simply argued to the judge that the question was proper. (Tr. 3107-08).

POINT VII

Judge Carter Properly Sentenced the Defendants

Each defendant claims that his sentence must be vacated because Judge Carter abused his discretion by taking a fixed mechanical approach to sentencing in disregard of the individual differences between defendants, by relying upon erroneous assumptions about each defendant's background and participation in the crime, and by weighing impermissible factors. All of these claims are without merit.*

A. The Sentencing Hearing

During the sentencing hearing, Judge Carter readily received all information tendered to him in any form. The District Judge informed counsel that he had read each of the presentence reports prepared by the Probation Department and he repeatedly emphasized his desire to have any corrections necessary made a part of the record. (Tr. 4166-67, 4173-75). Each defense counsel read the pre-sentence reports (Ramirez, Tr. 4156; M. Navas, Tr. 4168; E. Navas, Tr. 4178; Rojas, Tr. 4185; Mejias, Tr. 4191; Padilla, Tr. 4201; Salazar, Tr. 4209), however, no material corrections were offered to the court by any one of them.

Despite being familiar with the evidence of each defendant's involvement in the conspiracy as a result of the six weeks long trial, an invaluable means for the court to familiarize itself with the defendants and to determine the weight to be placed on facts advanced at sentencing, *United States* v. *Robin*, Dkt. No. 76-1033,

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* Rojas joined in this argument but he did not prepare his own brief on the point. (Rojas Br. 38).

slip. op. 5829, 5836 (2d Cir. Oct. 15, 1976), Judge Carter patientlly listened to the Government while it addressed the court on general matters relevant to its determination of the sentences appropriate in this case.*

After the Government addressed the court, Judge Carter listened to extensive presentations from defense counsel. He heard arguments for less severe sentences than he would otherwise impose (Tr. 4169, 4178, 4196, 4205-06) but he also heard defense counsel and defendants confirm material elements of the Government's case and state facts generally considered unfavorable to a defendant.**

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* Among other things, the Government emphasized the seriousness of the crime and the fact that each defendant participated in the conspiracy at the wholesale level or higher. It also stressed the particularly convincing nature of the evidence against each defendant and of the organization's criminal activities over a period of a year in length. Moreover, the Government reminded the court of the past criminal activities of Mejias, and Mario and Estella Navas, including the unlawful entry into the United States by them and their co-conspirators. In relation to their alien status, the Government emphasized that Mejias, Salazar and Rojas had entered the United States unlawfully after previously being deported. The Government also mentioned that there was no evidence that any of the defendants had any legitimate means of support at the time he was shown to be a member of the conspiracy and that, on the other hand, monies seized and bail forfeited gave a fair picture of the profitability of the conspiracy's operations. Finally, the Government argued that the court should consider seriously the sentences to be served, not only those to be imposed. (Tr. 4158-66).

** For example, Mario Navas admitted to being a petty criminal all his life until one or two years prior to his arrest, during which period he was distributing narcotics. (Tr. 4169). Rojas admitted to being an illegal resident of the United States for sixteen years. Mejias' attorney could not categorically state that his client was truly a Roman Catholic priest or any other type of minister during the time of the conspiracy charged, though he represented himself to be one. Padilla's counsel admitted his client's acts in furtherance of the conspiracy were inconsistent with his prior life and he provided the missing motive for Padilla's criminal

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Judge Carter also heard from the defendants who chose to address him. Only two said anything of substance related to the charges: Mario Navas admitted his guilt and described his wife as his assistant; Padilla said he did not feel guilty.

B. Discussion

It is uncontested that each defendant received a sentence within the statutory limit. Therefore, appellate review is at an end, *Dorszynski* v. *United States*, 418 U.S. 424 (1974). The defendants have failed to establish that Judge Carter sentenced them on the basis of material false assumptions as to facts relevant to sentencing, *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970); information that was materially incorrect, *United States* v. *Stein*, Dkt. No. 76-1299, slip op. 211, 223 (2d Cir., Oct. 22, 1976); *United States* v. *Robin*, *supra*, slip. op. at 5834-35; or constitutionally impermissible factors. *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973).*

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conduct, the desire to recoup unwise investments from a $50,000 lottery winning. (Tr. 4205-06). Finally, Salazar's attorney conceded his client's true name was Carlos Julio Bello Valenzuela, an identification of his client the Government had proven only by circumstantial evidence and which unquestionably established him as a principal organizer in the conspiracy. Further, he admitted that Salazar led a life of "heavy criminality" before becoming a principal in the conspiracy charged. (Tr. 4212-13).

* Padilla's argument that the sentence imposed on him, because he was then sixty-two years old, constituted cruel and unusual punishment, is not subject to review, on that basis alone, since his sentence was within the statutory maximum. *United States* v. *Tramunti*, *supra*, 513 F.2d at 1120; *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Minuse*, 142 F.2d 388, 390 (2d Cir.), *cert. denied*, 323 U.S. 716 (1944); *United States* v. *Perri*, 513 F.2d 572, (9th Cir. 1975).

1. Judge Carter sentenced each defendant individually

Defendants offer no facts to support their argument that Judge Carter took a fixed, mechanical approach to their sentence and disregarded their individual situations. Padilla, Mario Navas, Estella Navas and Ramirez argue that, since a fifteen-year sentence was imposed on each defendant, the sentences were presumptively improper. (Padilla Br. 19-21; Navas-Ramirez Br. 24). Salazar and Mejias support their similar argument with the completely misleading statement that Judge Carter said he would impose such sentences in the future in other cases. (Salazar-Mejias Br. 77).

These contentions fly directly in the face of Judge Carter's *statement* that he would sentence each defendant based on his personal evaluation of 1) what he regarded as the seriousness of his or her participation in the crimes charged, 2) the information in the pre-sentence reports, 3) the evidence introduced during the trial, as well as 4) the Government's and the defense's comments on sentence. (Tr. 4157, 4175-76). The sentences themselves show Judge Carter took an individual approach to sentencing, as he said he would. Where a defendant was convicted of two or more counts of the indictment, Judge Carter used the second count as a means of imposing a sentence which would differentiate between the levels of participation of the defendants. Thus, two of the most culpable defendants, Mejias and Mario Navas, received consecutive sentences and Estella Navas and Rojas, less culpable defendants, received concurrent sentences. The effect of such sentences on time to be served is obviously substantial.

Judge Carter also treated persons who were on the same level of the organization equally. Thus, Mario Navas and Mejias received sentences similar to that of

Salazar. Padilla, Ramirez and Rojas received sentences similar to that of Estella Navas. In addition, Judge Carter complied with the requests made by the attorneys for Estella Navas (Tr. 4180-81), Rojas (Tr. 4188) and Padilla (Tr. 4205) that each be given credit for time served in state custody. Finally, Judge Carter did not impose the maximum sentence he could have imposed on any defendant but one, Salazar, the person whom the evidence showed to be at a higher level in the organization than Mejias. (*E.g.*, GX 100-8, 100-8A, 100-8T).

Judge Carter's comments at the time of sentencing also showed that he was fully aware that each defendant was to be treated individually and that he did not intend to take a mechanical approach to sentencing. Thus, he indicated he had never before imposed sentences he considered to be as severe (Tr. 4216). He credited each defendant with or acknowledged the precise time each served in state custody prior to his federal arrest. (Tr. 4217). He made express reference to the family situation of Estella Navas, including the need for someone to care for her child, but, aware that at the time of her arrest Mrs. Navas denied her child was hers (Tr. 1264), he rejected that as a factor to be weighed heavily in her favor. (Tr. 4217). In addition, he reflected on the fact that Estella and Mario Navas and Mejias were very active in the conspiracy (Tr. 4218) and that the evidence did not as clearly delineate where in the organization Padilla and Ramirez held positions. (Tr. 4218). As Padilla's counsel had urged, Judge Carter specifically acknowledged Padilla as the only legal alien among the defendants but stressed that he found Padilla's motive in entering the organization was to make money. Finally, the court admitted that through Salazar's counsel's remarks, Salazar's role was no longer in doubt (Tr. 1219). That Judge Carter was fully aware of the factors to be considered in sentencing each defendant, and of the effect

his sentences would have, cannot be in question. When counsel for Mejias inquired whether the court imposed the consecutive sentence on Mejias and Mario Navas with the intention of causing each to serve his full sentence on the first count before beginning to serve the second, Judge Carter left no doubt that he had purposely imposed such sentences on them realizing the effect they would have. Judge Carter clearly made a careful appraisal of the variable components relevant to the sentence of each defendant upon an individual basis, *United States* v. *Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974), and nothing in the record indicates he made statements reflecting a disapproved fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. *United States* v. *Baker*, 487 F.2d 360, 361 (2d Cir. 1973).

Defendants also argue that Judge Carter erred in failing to consider the sentences Judge Cannella gave the defendants convicted in the *Bravo* trial and the considerations underlying those sentences. However, the defendants studiously avoided bringing the sentences in the related case to Judge Carter's attention. Their silence on the matter forecloses them from arguing here that Judge Carter erred in failing to consider it. *Cf. United States* v. *Stein*, *supra*, slip op. at 225-26; *United States* v. *Robin*, *supra*, slip op. at 5835-41; *United States* v. *Hermann*, 524 F.2d 1103, 1104 (2d Cir. 1975); *United States* v. *Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Needles*, 472 F.2d 652, 658 (2d Cir. 1973); *United States* v. *Malcolm*, *supra*, 432 F.2d at 817. Even if those sentences had been brought to Judge Carter's attention, he was under no obligation to limit his sentences to the maximum sentence imposed in the related trial. There is no requirement that co-conspirators receive identical

sentences. Sentences should not be meted out on the basis of a comparison study since the punishment is to fit the individual rather than the crime. *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968).

2. Judge Carter did not rely on any erroneous assumptions

Padilla claims that the Government incorrectly indicated that he entered the United States to commit crimes, that he had no legitimate means of support, that he had a prior record and that he had a prior connection with narcotics. (Padilla Br. 22). His argument is unsupported by the record. The Government made no such assertions and there is no evidence that Judge Carter relied on any such facts. Even assuming such comments were made, the sentence was proper since the entire record shows that Padilla's counsel had a full opportunity to correct any alleged "misstatements" as well as to present to the court any information he wished it to consider.*

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* At the sentencing, Padilla's counsel conceded that Padilla's background was accurately presented in the presentence report and, in greater detail, in a letter of the defendant given to the court. Moreover, he took issue only with certain characterizations in the general section of the presentence report which he now apparently argues were the false assumptions on which Judge Carter relied. At sentencing, Padilla did not argue, as he does now, that such characterizations were incorrect. He merely questioned whether the court should accept them in light of his prior history and the allegedly limited evidence against him. With respect to his prior history, however, Padilla's counsel correctly observed that once Padilla had won $50,000 in the New York State Lottery in March 1974, Padilla stopped "pursuing the very values our society extols." (Tr. 3629, 4205). Not surprisingly, this admitted change in Padilla's character coincided precisely with that period of time during which the Government's

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There is no impropriety in the sentencing process where, as here, sentence is imposed after defense counsel has had ample opportunity to discuss and explain inaccuracies, if any. *United States* v. *Stein, supra,* slip op. at 225-26; *United States* v. *Robin, supra,* slip op. at 5135-41; *United States* v. *Hermann, supra,* 524 F.2d at 1104; *United States* v. *Rosner, supra,* 485 F.2d at 1230; *United States* v. *Needles, supra,* 472 F.2d at 658; *United States* v. *Malcolm, supra,* 432 F.2d at 817. Having afforded Padilla such an opportunity, Judge Carter made it abundantly clear that he had considered Padilla's unique background. (Tr. 4219). Indeed, he is the only defendant who has not argued on this appeal that Judge Carter based his sentence on the fact that he was an illegal alien, thereby conceding that Judge Carter recognized he had lawfully entered the United States. Having had such information at his disposal, Judge Carter was not bound to weigh more heavily on Padilla's behalf the information which Padilla argued favored him. *Cf. United States* v. *Needles, supra,* 472 F.2d at 653.

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proof showed him to be an active member of the conspiracy. Padilla also mentioned certain facts more clearly in his favor. He emphasized not only that he had no prior criminal record but also that in the past he was steadily employed and supported a family. Finally, Padilla stressed that, unlike his co-defendants, he had entered the United States lawfully and was a legal resident alien. (Tr. 4201-03). Defense counsel concluded his remarks by attacking the Government's characterization of Padilla as a high-level narcotics dealer and by remarking that Padilla did not live in a luxury apartment or neighborhood. Finally, counsel for Padilla also said he believed the court was aware of all these facts. (Tr. 4202-03).

3. Judge Carter did not sentence defendants on the basis of impermissible factors

Each defendant, other than Padilla, asserts that Judge Carter based his sentence on the fact that the defendants were aliens. There is no substance to this claim.

The claim is based solely upon the following statement by Judge Carter before imposing sentence:

> "Let me make clear that the sentences I am going to give will probably be the most severe that I have ever given in my career, and I am going to do that and I don't want to sound like a jingoist but I am doing it because I think that people who come and deal in drugs and traffic and make profit on it from foreign countries coming into this country, that is something that as judge, when I have an opportunity to I cannot tolerate." (Tr. 4216).

The sentences the court imposed in this case as well as Judge Carter's remarks, including the allegedly offending remark, reflect that, while aware of everything defendants sought to bring to his attention, Judge Carter weighed most heavily the nature and seriousness of the crime as well as the prominent role each member played in the conspiracy.

Even if this one remark could be viewed as indicating a particular consideration underlying the well-merited sentences in this case, cf. *United States* v. *Araujo*, *supra*, 539 F.2d at 292 (2d Cir. 1976). Judge Carter was entitled to consider that the complaining defendants were illegal aliens and had come to the United States for the singular purpose of distributing narcotics here. Their entire connection with this country was criminal in nature and their apparent motive was to reap profits in utter disre-

gard of the criminal law. *Cf. Billiteri* v. *Board of Parole*, 541 F.2d 938 183-84 (2d Cir. 1976); *United States* v. *Sweig*, 454 F.2d 181, (2d Cir. 1972). Moreover, these defendants were not part of our criminal society merely by accident of birth in the United States. On the contrary, they had consciously targeted the United States, to the exclusion of all other countries, as the place where they would distribute narcotics.

Defendants cannot seriously urge this Court to find error in Judge Carter's sentencing because he expressly referred to these factors and others as weighing heavily upon his determination of a proper sentence for each defendant. With no roots in this country, the defendants were free to do and the proof showed they did whatever they believed would help them avoid detection by law enforcement authorities, including frequently making changes of identity and residence. Consequently, it was more difficult to detect the presence of this criminal organization and to obtain evidence sufficient to prosecute it successfully. Moreover, once prosecuted successfully, these defendants were not subject to the liabilities of a criminal conviction which an American citizen suffers. With no roots in any community or any significant family ties here, these defendants would not suffer any shame as a result of their conviction. As non-citizens they could suffer no loss of voting eligibility. As non-workers, they could not lose former employment or suffer the increased difficulty the ex-convict has in finding suitable legitimate employment. Indeed, the only loss the court could cause these defendants was the loss of their freedom for a period of time. Given the enormous profitability of their criminal activities, a sentence of short duration and even shorter incarceration could only make whatever loss of freedom they suffered entirely worthwhile. Judge Carter, therefore, must have known that the only way he could establish the credibility

of the American criminal justice system as a deterrent to crime by foreign nationals would be to impose a sentence which left no doubt that the people of the United States would not tolerate the crimes of these defendants or of anyone like them to follow. In imposing sentence, in part, as a deterrent to those defendants and others who might violate our laws in the future, Judge Carter was, as this Court has long recognized, acting well within his discretion. *United States* v. *Kaylor*, 491 F.2d 1133, 1139 (2d Cir.), vacated on other grounds *sub nom. United States* v. *Hopkins*, 418 U.S. 909 (1974); *United States* v. *Panico*, 308 F.2d 125, 128 (2d Cir. 1962), vacated on other grounds, 375 U.S. 29 (1963); *United States* v. *Schipani*, 315 F. Supp. 253, 255 (E.D.N.Y.) (and authority cited therein); *aff'd* 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971). The court may utilize a broad array of factors bearing on the nature of both the crime and the defendant. *United States* v. *Needles*, *supra*, 472 F.2d at 657-58. In deciding what degree of sentence would be an effective deterrent, the court properly considered the defendants were illegal aliens and that, as such, the range of the Court's power to impose a just sentence was sharply limited.

CONCLUSION

The judgments of conviction should be affirmed

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

MICHAEL Q. CAREY,
NATHANIEL H. AKERMAN,
FREDERICK T. DAVIS,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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